UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

EQUINOX, Employer, and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 87 Union	Case 20-RC-153017

EMPLOYER'S REQUEST FOR REVIEW

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Pursuant to Section 102.67(c) of the National Labor Relations Board's ("Board" or "NLRB") Rules and Regulations, Equinox Holdings, Inc. ("Equinox" or "Employer" or "Company"), requests that the Board review and overturn the Regional Director's November 10, 2015[1] Decision and Certification of Representative ("Decision")[2], which certified Service Employees International Union, Local 87 ("Union") as the exclusive collective bargaining representative of the petitioned for employees of Equinox in San Francisco, California in the above captioned case. A substantial question of law or policy is raised because of the Regional Director's departure from officially-reported Board precedent and the Case Handling Manual. Specifically, the Regional Director erred in concluding that Equinox failed to sustain its burden to prove that the Union and/or third parties engaged in any objectionable conduct that would warrant setting aside the election and recommended that Equinox's Objections[3] be overruled in their entirety. The Regional Director's adoption of the Hearing Officer's September 18, 2015 Report and Recommendation ("Report")[4] for the reasons he cites in his Decision and for the reasons cited by the Hearing Officer in his Report were clearly erroneous and prejudicially affected the rights of Equinox. Likewise, the Hearing Officer's rulings made in connection with the Representation Hearing resulted in prejudicial error.

I. BACKGROUND

The Union filed a representation petition in this matter on May 27, 2015. Pursuant to a stipulated election agreement, an election was conducted by the NLRB on June 19 among all full-time and regular part-time maintenance associates, maintenance MODs, and building operations associates employed by the Employer at its three San Francisco fitness clubs located at 747 Market Street ("Market Street" or "Sports Club SF"), 301 Pine Street ("Pine Street"), and 2055 Union Street ("Union Street", collectively "fitness clubs"). (Tr. 79, 82-83) Approximately 40-50% of the employees at the three fitness clubs are Hispanic. (Tr. 84) The voting times of the

[1] All dates refer to 2015 unless otherwise noted.
[2] The Decision is attached as **Exhibit A**.
[3] The Objections are attached as **Exhibit B.**
[4] The Report is attached as **Exhibit C**.

election were from 12:00 PM to 1:00 PM and 4:45 PM to 5:45 PM at Market Street, from 12:45 PM to 3:15 PM at Pine Street, and from 1:15 PM to 2:45 PM at Union Street. (Tr. 398-399, 407) The tally of the ballots served on the parties at the conclusion of the election showed that of approximately 78 eligible voters, 41 cast ballots for the Union; and 33 against the Union. There was one challenged ballot. The Employer timely filed Objections to the election. The Objections were timely served upon the Union. The NLRB issued a Direction and Notice of Hearing on Objections on July 2 ("Notice of Hearing"). The NLRB set for hearing Objections 1, 2, 3, 4 and 5.

On July 7, the Employer served the Union's Custodian of Records with Subpoena Duces Tecum B-1-NBVGLJ ("Subpoena"). On July 10, the Union filed a Petition to Revoke the Subpoena. On July 14, the Employer served a former employee of Equinox with Subpoena Ad Testificandum A-1-NBJFIZ.

The hearing was held on July 13, 14, and 15 before Hearing Officer Reeves.

Prior to the presentation of evidence, the Hearing Officer ruled on the Petition to Revoke and ordered the Union to produce certain documents responsive to the Subpoena by close of business on July 13, or at the latest by the morning of July 14. During the evening of July 13, the Union produced some documents responsive to Subpoena, including text messages exchanged between the Union and its purported agents. During the morning of July 14, Counsel for the Employer asked counsel for the Union to confirm that the Union had produced "all documents" responsive to the Subpoena that were in the Union's possession, custody and control. The Union confirmed it had produced all documents responsive to the Subpoena. Notwithstanding counsel for the Union's representation, during the evening of July 14, the Union produced additional documents responsive to the Subpoena, including certain e-mail communications between Union and its purported agents. By July 15, the third day of the hearing, it became clear that the Union had not fully complied with the Subpoena and had not produced a number of documents responsive to the Subpoena, including text messages exchanged between the Union and other purported agents, as well as payroll documents establishing that Rosario Rodriguez was an

employee organizer of the Union during the critical period, including when Ms. Rodriguez served as one of the Union's observers.

Hearing Officer Reeves issued his Report on September 18. The Employer submits that both the Report and the Objections Hearing were rife with significant flaws which prejudiced the Employer. The Report reaches conclusions which simply are not supported by both the evidence and Board precedent. Additionally, the Employer was prejudiced by the Hearing Officer's evidentiary rulings as well as the Hearing Officer's refusal to allow the Employer an opportunity to seek enforcement of its Subpoena Ad Testificandum A-1-NBJFIZ. The Employer timely filed Exceptions to the Hearing Officer's Report.

On November 10, the Regional Director issued his Decision certifying the Union. In his Decision, he found that the Hearing Officer's rulings made at the Hearing were free from prejudicial error and were thereby affirmed. The Regional Director also found in agreement with the Hearing Officer that all of the Employer's Objections should be overruled. The Regional Director's Decision largely adopted the Hearing Officer's erroneous findings and reasoning contained in the Report without any further explanation. The Board should overturn the Regional Director's Decision and set aside the election for the following reasons.

II. THE ELECTION SHOULD BE SET ASIDE BASED UPON THE UNION AND ITS AGENT'S THREATS OF JOB LOSS AND DEPORTATION (OBJECTION # 1)

Employer's Objection #1 states:

> During the critical period preceding the Election and/or during the Election, the Union, through its officers, employees, agents, authorized representatives and others acting on its behalf and/or with its apparent authority, actual or implied endorsement or ratification, threatened, intimidated, harassed and coerced voting unit employees by telling voting unit employees that they would call INS and they would lose their job if they did not vote "Yes" or for the Union in the Election. Such conduct had a coercive impact on eligible voters, destroyed the laboratory conditions required in Board elections and improperly affected the results of the election.

A. Evidence Relevant to Objection 1

1. Rosario Rodriguez, Claudia Matthews and Soga Eneliko Were Agents of the Union

a. The Hearing Officer properly found that Rosario Rodriguez was an agent of the Union from June 1 to June 21, 2015

The hearing transcript is replete with facts establishing that Ms. Rodriguez, Ms. Matthews and Mr. Eneliko were agents of the Union or acted on behalf of the Union during the critical period. Union President Olga Miranda's admissions during the hearing are telling. Specifically, she testified that Ms. Rodriguez, Ms. Matthews and Mr. Eneliko were members of the Organizing Committee and were the main conduits by which the Union received its information about the campaign. (Tr. 39, 76)[5] Ms. Miranda testified the Organizing Committee collected cards, called voting unit employees about the Union, and brought voting unit employees to Union meetings. (Tr. 34, 36, 47, 49, 76) In addition, while Ms. Miranda initially denied that the Organizing Committee actively tried to "persuade employees to vote for the Union", eventually she admitted it was part of their job duties. (Tr. 37, 76)

Ms. Rodriguez testified she was employed by the Union as an "organizer" since June 1. (Tr. 366) Ms. Rodriguez admitted she was in regular contact with Ms. Miranda and frequently exchanged text messages with her since June 1. (Tr. 368-370) Ms. Rodriguez admitted she met at the Union's office on a daily basis to discuss campaign strategy. (Tr. 368-370; E. Exh. 2, pp. 009-0075) Ms. Rodriguez admitted the Union directed her to solicit cards. (Tr. 374; E. Exh. 2, pp. 0040-0041) Ms. Rodriguez admitted the Union directed her to contact specific employees from a voter list and she reported back to the Union what was discussed. (Tr. 380, 383-384; E. Exh. 2, p. 0055) Ms. Rodriguez admitted that employees looked to her for answers to their questions about the Union and the election. (Tr. 368) Ms. Rodriguez admitted employees contacted her about what was said during captive audience speeches and she reported the content of the speeches and what she discussed with employees back to the Union. (Tr. 378; E. Exh. 2,

[5] References to the Hearing Transcript are noted as "(Tr.--)", to the Employer Exhibits as "(E. Exh.--)", to Board Exhibits as "(B. Exh.--)", to pages of the Regional Director's Decision as "(RDD --)", and to the Hearing Officer's Report as "(HO --)".

pp. 0049-0054, 0065) During one such communication, an employee sent Ms. Rodriguez a text message stating that an employee had identified Ms. Rodriguez as "**working at the union office**" to other employees during a captive audience speech. (E. Exh. 2, pp. 0051-0053) Ms. Rodriguez admitted obtaining Employer campaign literature from employees and providing it to the Union. (Tr. 376) The record reflects at least seven occasions when Ms. Rodriguez provided campaign literature to Ms. Miranda. (Tr. 377, 423; E. Exh. 2, p. 0014-0015, 0024-0025, 0031, 0034-0035, 0057-0058, 0068-0069, 0072-0073, 0075) Ms. Rodriguez admitted she was involved in coordinating key organizational events like Union meetings, picketing and rallies. Specifically, Ms. Rodriguez admitted she asked employees to come to Union meetings. (Tr. 374) Ms. Rodriguez admitted she organized a picket line at Equinox, exchanged text messages with Ms. Miranda about it and texted other employees to join the picket line. (Tr. 391-392; E. Exh. 2, pp. 0065-0066) In addition, Ms. Rodriguez communicated with Ms. Miranda about the content and messaging of a rally/action directed at Equinox and Ms. Miranda directed her to speak at the rally/action. (Tr. 386-387; E. Exh. 2, pp. 0059-0061)

Based on the foregoing the Hearing Officer properly found that Ms. Rodriguez's "sole duties were to attempt to win the support of unit employee in the June 19 election." (HOD 8, ¶ 2) The Hearing Officer also found that "she was the principal contact between the Union and the unit employees." (HOD 8, ¶ 2) The Hearing Officer further found that Ms. Rodriguez "was the Union's agent" from June 1 to June 21. (HOD 8, ¶ 2) Accordingly, the Regional Director properly affirmed the Hearing Officer's Report on this issue. (RDD 3, fn. 2)

b. The Hearing Officer's finding that Ms. Matthews and Mr. Eneliko were not acting as agents of the Union was clearly erroneous and resulted in prejudicial error

Ms. Rodriguez testified that she, along with Ms. Matthews and Mr. Eneliko had "**equal contact**" with voting unit employees and performed the same job duties. (Tr. 367) Thus, they were actively engaged on the organizing committee, contacted voting unit employees to persuade them to support the Union and were the main conduits by which the Union received its

information about the campaign. All three individuals contacted voters at the direction of the Union President, including performing phone bank duties and contacting voting unit employees on the day of the election during the polling times. (Tr. 34, 36, 47, 49, 76) As will be discussed herein, the Union's observers actively solicited employees to vote for the Union and during the polling hours, they highlighted the names of the voters who had come to vote. (Tr. 419-420; E. Exh. p. 5) The evidence clearly indicates they were directed to do so by Union President Olga Miranda. Not surprisingly, all three of them served as the Union's observers at the election. (Tr. 404) Accordingly, it is irrefutable that Ms. Rodriguez was an agent of the Union, and her testimony established that Ms. Matthews and Mr. Eneliko were also acting as agents of the Union.

Based on the foregoing, the Regional Director's adoption of the Hearing Officer's finding that Ms. Matthews and Mr. Eneliko were not acting as agents was clearly erroneous and resulted in prejudicial error. (HOD 7, fn. 8; RDD 3, fn. 2) Likewise, the Regional Director's ruling that the proper analysis of the alleged conduct of employees other than Ms. Rodriguez was under the Board's nonparty (or third-party) standard was a departure from officially reported Board precedent concerning agency. (See cases cited in Section II.A.2.d.) (RDD 4, ¶ 1)

2. <u>Rosario Rodriguez, Claudia Matthews and Soga Eneliko Had A Motive and Developed a Plan to Threaten, Intimidate, Harass and/or Coerce Voting Unit Employees Into Voting for the Union</u>

a. The Hearing Officer's failure to consider Mr. Pineda's testimony to show that Ms. Rodriguez, Ms. Matthews and Mr. Eneliko had a motive and developed a plan to threaten, intimidate, harass and/or coerce voting unit employees into voting for the Union was clearly erroneous, contrary to officially reported Board precedent and resulted in prejudicial error

Miguel Pineda testified he overheard multiple conversations between three former MODs Ms. Rodriguez, Ms. Matthews and Mr. Eneliko at Market Street. (Tr. 273-274) Mr. Pineda worked at Market Street as a MOD from October 2014 until January/February 2015. (Tr. 271-272, 282, 283) Mr. Pineda then worked at Pine Street as a maintenance associate up through the

time of the election. (Tr. 271-272) During the time period Mr. Pineda worked at Market Street, Ms. Rodriguez, Ms. Matthews and Mr. Eneliko frequently met in the Building Operations Office next to the employee break room/lunch room to discuss various issues. (Tr. 274, 327) At times, Mr. Pineda overheard their conversations. (Tr. 284, 289) Mr. Pineda heard Ms. Rodriguez, Ms. Matthews and Mr. Eneliko discussing how they were going to try to bring in the Union. (Tr. 273) Mr. Pineda overheard them say "if they couldn't do it one way [in reference to bringing in the Union], they were going to try a different way." (Tr. 273) Mr. Pineda also overheard them say they were going to "intimidate" employees by threatening to "call immigration to see if they could convince [employees] from that angle". (Tr. 276-277) The plan began in the pre-petition period but was implemented during the critical period. Mr. Pineda's testimony is relevant to show that Ms. Rodriguez, Ms. Matthews and Mr. Eneliko had a motive and developed a plan to threaten, intimidate, harass and/or coerce voting unit employees by telling them they would call immigration.[6] Likewise, Mr. Pineda's testimony is relevant to substantiate and/or corroborate other employee witnesses who testified that Ms. Rodriguez, Ms. Matthews and Mr. Eneliko made similar threatening statements to them concerning immigration and/or losing their job during the critical period. Contrary to the Hearing Officer's finding (RDD 7, ¶ 1), the pre-petition conduct was directly related to the post-petition conduct and must be allowed to shed light on the conduct that occurred during the critical period. Thus, the Regional Director's

[6] While, generally "the Board will not consider instances of pre-petition conduct as a basis upon which to set aside an election," *Dresser Industries, Inc.*, 242 NLRB 74 (1979); *see also The Ideal Electric and Manufacturing, Company*, 134 NLRB 1275 (1961), these rulings do not create an absolute bar to considering pre-petition misconduct. The rule set forth in *Ideal Electric* does not preclude consideration of conduct occurring before the petition is filed where, as here, such conduct adds meaning and dimension to related post-petition conduct." *Id.; see also, Stevenson Equipment Company*, 174 NLRB 865 at 866, fn. 1 (1969); *Warren W. Parke, d/b/a Parke Coal Company*, 219 NLRB 546, 547 (1975). In fact, in *Shamrock Coal Co.*, 267 NLRB 625 (1983), the Board found that the employer's prepetition conduct – threatening employees for their union activities – appeared to be directly related to post-petition conduct consisting of threats and intimidation. Thus, "the testimony regarding the Employer's prepetition conduct may be utilized to shed light on those events occurring in the post-petition period." *Id.* at 625-626. In the instant case, the evidence substantiates that Ms. Rodriguez, Ms. Matthews and Mr. Eneliko initiated the plan and carried it out during the critical period after the petition was filed. Just as in *Shamrock Coal*, the pre-petition conduct was directly related to the post-petition conduct and must be allowed to shed light on the conduct that occurred during the critical period.

adoption of the Hearing Officer's Report on this point was clearly erroneous, contrary to officially reported Board precedent and resulted in prejudicial error. (HOD 7, fn. 8; RDD 3, fn. 2)

b. The Regional Director's failure to overrule the Hearing Officer's credibility finding concerning Mr. Pineda was clearly erroneous and resulted in prejudicial error

Notably, the Union did not call Mr. Eneliko as a witness to rebut Mr. Pineda's testimony. In addition, while the Union did call Ms. Rodriguez as a witness, she was never asked about her pre-petition conversations with Ms. Matthews and Mr. Eneliko. (Tr. 358-360) The only witness the Union called to rebut Mr. Pineda's testimony was Ms. Matthews. Not surprisingly, Ms. Matthews, as an agent of the Union, denied discussing the "possibility of bringing in immigration as a way to influence to election" with Ms. Rodriguez and/or Mr. Eneliko. (Tr. 323) However, Ms. Matthews did not deny discussing the topic of immigration outright. (Tr. 323-325) In any event, Ms. Matthews's testimony was simply not credible. Ms. Matthews was one of the main Union organizers at Equinox, was admittedly unhappy about her termination from Equinox, and had a motive to lie. (Tr. 39, 335, 367-368) On the other hand, Mr. Pineda had no reason to lie. Accordingly, the Hearing Officer should have credited Mr. Pineda's testimony over Ms. Matthews's based on the record evidence.

In rejecting Mr. Pineda's testimony, the Hearing Officer drew an adverse inference based on the Employer not calling Julio (the manager at the time) as a witness to support Mr. Pineda's testimony that he reported what he overhead to Julio. (HOD 7, ¶ 1) Not only would Julio's testimony been double hearsay, but it would have been irrelevant to the effect that Ms. Matthews, Ms. Rodriguez and Mr. Eneliko's statements had on the hearer, Mr. Pineda. In addition, Julio was no longer employed by the Employer at the time of the Hearing and left under less than amicable circumstances. He cannot be presumed to be favorably disposed towards the Employer at the time of the Hearing. Thus, it was clearly erroneous for the Hearing Officer to draw an adverse inference from the fact that Julio, who was equally available to the Union, was

not called as a witness. It was likewise contrary to officially reported Board precedent. *See e.g., Irwin Industries*, 325 NLRB 796, 811 (1998) (no adverse inference drawn from a respondent's failure to call supervisors who no longer worked for it).

Finally, the Hearing Officer's conclusion that he does not think it was likely that "approximately two months before they contacted a union, and one month before they apparently had reason to contact a union, they would be plotting to win a union election by threatening employees with ICE" is entirely speculative and presumes facts not in evidence.

Accordingly, the Regional Director's failure to overrule the Hearing Officer's credibility resolution concerning Mr. Pineda was clearly erroneous and resulted in prejudicial error. (HOD 7, ¶ 1; RDD 3, ¶ 2, fn. 2)

3. Rosario Rodriguez Threatened Elpidio Garay That She Would Call Immigration If He Did Not Support the Union

a. Mr. Garay credibly testified that Rosario Rodriguez threated to call immigration if he did not support the Union

Elpidio Garay works at Market Street as a maintenance associate. Mr. Garay credibly testified he had at least two conversations with Ms. Rodriguez regarding the Union prior to the election. (Tr. 185) The first conversation occurred approximately 15 days prior to the election. (Tr. 185) During this conversation, Ms. Rodriguez threatened that "if the Union lost, she was going to take it upon herself to bring immigration in." (Tr. 181-182) Ms. Rodriguez made a similar threat to Mr. Garay on at least one other occasion. (Tr. 185) Following Mr. Garay's conversations with Ms. Rodriguez, Mr. Garay reported what Ms. Rodriguez told him to another maintenance associate at Market Street named Julio,[7] who Mr. Garay believed was Ms.

[7] The Union called a maintenance associate at Market Street named Julio Hernandez. Contrary to the Hearing Officer's finding (HOD 4, ¶ 2), it is unclear from the record whether this is the same Julio who Mr. Garay testified about. Indeed, Mr. Hernandez testified he was not related to Ms. Rodriguez. (Tr. 342) In addition, Mr. Hernandez claimed this conversation with Mr. Garay occurred at the towel station, rather than in the break room. (Tr. 337-339) In the any event, even assuming *arguendo* this was the same Julio, the Hearing Officer erred in crediting Mr. Hernandez's testimony over Mr. Garay's. Mr. Hernandez was not a credible witness and offered ambiguous contradictory testimony regarding his conversation with Mr. Garay. Indeed, on direct examination, Mr. Hernandez testified he had only one conversation with Mr. Garay regarding immigration. (Tr. 338) Initially, he claimed it was after the petition was filed, but then

Rodriguez's nephew. (Tr. 186, 188) This conversation occurred in the employee break room during lunchtime. (Tr. 195) At least two other maintenance associates, Carla (last name unknown) and Nalleli (Mendoza) were present for the conversation. (Tr. 195) Based on this lunchtime conversation, Mr. Garay testified he believed that Ms. Rodriguez's statement spread throughout the workplace at Market Street. (Tr. 188)

b. Mr. Garay's testimony was corroborated by other employee witnesses

Mr. Garay's testimony concerning Ms. Rodriguez was corroborated by Mr. Pineda, a maintenance associate who worked at both Market Street and Pine Street. Mr. Pineda testified that sometime in the month leading up to the election, Mr. Garay told Mr. Pineda "he was afraid and concerned" "that immigration would come in."[8] (Tr. 278-279) In addition, as discussed

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changed his testimony to state it was before the petition was filed. (Tr. 343) On direct examination, Mr. Hernandez testified that Mr. Garay approached him at the towel station and asked if "they were going to call immigration if the union was going to come in." According to Mr. Hernandez, Mr. Garay did not say who "they" was. (Tr. 339) In response, Mr. Hernandez claimed he told Mr. Garay it was "illegal." (Tr. 339) On cross-examination, however, Mr. Hernandez altered his testimony claiming Mr. Garay actually asked him "*will they be bringing immigration if we vote yes or no?*" (Tr. 353) In addition to his inconsistencies regarding his conversation with Mr. Garay, Mr. Hernandez was admittedly involved in the Union's organizing drive and had a motive to lie about his conversation with Mr. Garay. Mr. Hernandez admitted Ms. Miranda directed him to be the lookout when the Union attempted to serve the election petition on the Employer's General Manager, Patrick Ahern. (Tr. 340-341; E. Exh. 2, pp. 0023-0025) Mr. Hernandez also admitted he brought employer campaign handouts to the Union, told the Union what was said during captive audience speeches, and attended at least three union meetings. (Tr. 345-346) On the other hand, Mr. Garay had no reason to lie. Accordingly, the Regional Director's failure to overrule the Hearing Officer's credibility resolution concerning Mr. Hernandez was clearly erroneous and resulted in prejudicial error.

[8] On direct examination, counsel for the Employer attempted to elicit additional details about what Mr. Garay told Mr. Pineda during this conversation. The Hearing Officer sustained counsel for the Union's objection, stating it was "hearsay". (Tr. 279) The Employer is informed and believes that had Mr. Pineda been permitted to answer counsel for the Employer's question, he would have testified that Mr. Garay was afraid that immigration would come if they did not support the union and he would lose his job and face deportation. While the Hearing Officer appropriately described Mr. Pineda's testimony as hearsay, Mr. Pineda should have been permitted to answer the question, as his testimony establishes dissemination among voting unit employees of the Union and/or agent's statements relating to immigration/deportation. *See e.g.*, *Q.B. Rebuilders, Inc.*, 312 NLRB 1141, fn. 3 (1993) (Board held that hearing officer appropriately allowed in hearsay testimony to establish dissemination of threats concerning immigration/deportation). The Hearing Officer's evidentiary ruling on this point during the hearing was clearly erroneous, contrary to officially reported Board precedent and resulted in prejudicial error.

above, Mr. Pineda testified that prior to the petition being filed he overheard Ms. Rodriguez, Ms. Matthews and Mr. Eneliko state they were going to "intimidate" employees by threatening to "call immigration to see if they could convince [employees] from that angle". (Tr. 276-277)

Likewise, maintenance associate Nalleli Mendoza testified that she overheard three employees conversing together and asking questions about immigration. (Tr. 243-244, 254) On direct examination, counsel for the Employer attempted to elicit additional details about the substance of these conversations, including the names of the employees and what they said. (Tr. 245-246) However, the Hearing Officer sustained counsel for the Union's objection, stating it was "double hearsay" and that he didn't "think the name of the employees talking about it is going to add anything."[9] (Tr. 246-247)

c. The Hearing Office properly discredited Rosario Rodriguez's testimony

Ms. Rodriguez denied threatening Mr. Garay. (Tr. 359-360) However, as the Hearing Officer properly found, Ms. Rodriguez demonstrated she was not a credible witness and that none of "her material testimony" should be credited. (HOD 6, ¶ 2) For example, on direct examination, Ms. Rodriguez testified Mr. Garay "asked her if it was true that if the Union won, if immigration would come and deport them?" (Tr. 360) In response, Ms. Rodriguez claimed she told Mr. Garay "no, that is not true." (Tr. 361) On cross-examination, Ms. Rodriguez changed her testimony and used very different terminology to describe what she discussed with Mr. Garay. Instead, she claimed Mr. Garay asked her, "If the Union wins, will INS come in?" (Tr. 361) Notably, she used the word "INS" for the first time, and did not use the word "deportation".

[9] The Employer is informed and believes that had Ms. Mendoza been permitted to answer counsel for the Employer's questions, she would have testified that she overheard Mr. Garay asking questions about immigration. With respect to the hearsay ruling, the Hearing Officer appropriately described Ms. Mendoza's testimony as such. However, Ms. Mendoza should have been permitted to answer the question, as his testimony establishes dissemination among voting unit employees of the Union and/or agent's statements relating to immigration/deportation. *See e.g.*, *Q.B. Rebuilders, Inc.*, 312 NLRB at 1141, fn. 3. The Hearing Officer's evidentiary ruling on this point during the hearing was clearly erroneous, contrary to officially reported Board precedent and resulted in prejudicial error.

Upon further examination, Ms. Rodriguez back peddled again claiming Mr. Garay actually used the word "immigration", not "INS". (Tr. 361)

In addition to her inconsistent testimony regarding her conversation with Mr. Garay, Ms. Rodriguez was caught in outright lies about her involvement in the Union's organizing campaign. At other times, she was intentionally vague and simply stated "I don't remember" or "I can't recall." For the most part, Ms. Rodriguez only admitted that she had engaged in the incriminating conduct after she was confronted with her text messages. Ms. Rodriguez was untruthful and evasive about basic questions about her involvement in the campaign. Thus, it is beyond reasonable belief that Ms. Rodriguez would be telling the truth about a key conversation that would warrant overturning the election. Here are just a few of the many examples of her implausible testimony:

- Remarkably, Ms. Rodriguez denied exchanging any text messages with Ms. Miranda. (Tr. 375) Notably, counsel for the Employer asked her twice. She denied it both times. (Tr. 375) The record reflects she exchanged nearly 70 pages of incriminating text messages with Ms. Miranda regarding the election, demonstrating that she had committed perjury. (Tr. 375, E. Exh. 2, pp. 0008-0075)
- Ms. Rodriguez denied contacting employees by telephone to talk about the Union. (Tr. 379) Ms. Rodriguez also denied that Ms. Miranda directed her to contact specific employees from a voter list. (Tr. 380) Ms. Rodriguez's testimony was contrary to Ms. Miranda's testimony that one of her job duties was to "phone-bank" employees. (Tr. 49) In addition, after being confronted with her own text messages, Ms. Rodriguez recanted her testimony about contacting employees from the voter list and reporting back to the Union what she discussed with them. (Tr. 380, 383-384)
- Ms. Rodriguez denied discussing with Ms. Miranda the messaging of a rally/action directed at Equinox. After being confronted with her text messages, Ms. Rodriguez recanted her testimony. (Tr. 386-387)

- Ms. Rodriguez denied the Union ever distributed documents about the Union and/or the Company. (Tr. 375-376) However, the record reflects at least one text message concerning distribution of Union materials. Ms. Olga texted Ms. Rodriguez: "I sent Andrea the language for the justice for Janitors Day flier at EQUINOX. Look at it when she's done and let me know your thoughts." Ms. Rodriguez responded: "It's perfect Olga." Ms. Miranda replied: "Now, Ahmed is working on having team take fliers to the buildings starting tonight." Ms. Rodriguez then stated: "Soga will go with Juan after he gets off work to drop off Flyers." (E. Exh. pp. 0056-0057)
- Notwithstanding a memorable event like picketing her former employer, Ms. Rodriguez claimed she "didn't remember" having a conversation with Ms. Miranda regarding picketing and/or that she texted other coworkers about joining the picket line. (Tr. 391) After being confronted with her text messages, Ms. Rodriguez admitted exchanging text messages with Ms. Miranda on the topic and texting other employees to join the picket line. (Tr. 291-392)
- Ms. Rodriguez testified that she "didn't remember" asking to be the Union's observer. After being confronted with her text messages, which establish that in fact, she asked to be an observer, Ms. Rodriguez recanted her testimony. (Tr. 390, 392)

In short, Ms. Rodriguez was a "**witness with absolutely no regard for the oath she swore to tell the truth**." (HOD 6, ¶ 2) Accordingly, the Hearing Officer properly discredited "any of her material testimony that is subject of dispute." (HOD 6, ¶ 2)

d. The Regional Director's credibility resolution concerning Mr. Garay was clearly erroneous, contrary to officially reported Board precedent and resulted in prejudicial error

Notwithstanding the above, the Hearing Officer remarkably did not credit Mr. Garay's testimony that Ms. Rodriguez told him she would call immigration if he did not support the Union. (HOD 4, ¶ 3) The Regional Director adopted the Hearing Officer's finding on this point, stating that the Hearing Officer "reasonably discredited" Mr. Garay's testimony. (RDD 4, ¶ 1)

In discounting his testimony, the Hearing Officer pointed out that Mr. Garay "gratuitously" volunteered the approximate date he spoke with Ms. Rodriguez and that he believed Ms. Rodriguez's statement "spread" throughout the workplace. However, those responses, cannot serve as evidence of Mr. Garay being "coached" as the Hearing Officer contended. (HOD 4, ¶ 3) Similarly, Mr. Garay's testimony that he did not attend Employer meetings concerning the election (that other employees attended and believed were mandatory) does not establish that the conversation between Mr. Garay and Ms. Rodriguez did not occur. Furthermore, while the Hearing Officer stated that Mr. Garay was "hesitant, unsure of his testimony, and appeared to contradict himself", (HOD 4, ¶ 3) this was due Mr. Garay's inability to understand the questions asked, which were being interpreted from Spanish into English and vice versa. The interpreter had to "ask for repetition" and to "repeat the question" multiple times before she could interpret some of Mr. Garay's testimony. (Tr. 186, 189, 192) Indeed, at one point, when the Hearing Officer asked Mr. Garay if he told any supervisor or manager about his conversation with Ms. Rodriguez, Mr. Garay clearly stated, "**I don't understand**." (Tr. 190) When the Hearing Officer rephrased and Mr. Garay still failed to answer the question, the interpreter offered to "repeat the question." (Tr. 190) Upon further examination on the topic, the interpreter finally told the Hearing Officer that Mr. Garay did not understand some of the questions because of the use of certain "Spanish words" and appeared to be answering questions that weren't being asked of him. (Tr. 192)

The Hearing Officer also appeared to be slightly confused regarding why Mr. Garay waited until about two weeks prior to the hearing (i.e., on or about June 30) to report Ms. Rodriguez's threats to his manager, Zoe Castillo. (Tr. 192-193) There are a number of very plausible explanations why Mr. Garay waited to report these threats to Ms. Castillo. First, Mr. Garay was instructed by the Hearing Officer not to reveal his immigration status, as it was not relevant to the hearing. (Tr. 192-193) However, insofar as Mr. Garay had concerns with his immigration paperwork and/or he subjectively feared the Union would contact immigration if he did not support the Union, it is not surprising he would not have volunteered this to the

Employer, who is legally responsible for determining that he and other employees were eligible to work in the United States. Second, June 30 was just a few days after the Employer's objections to the conduct of the election were due. In and around that time period, the Employer would have been investigating potential objections to the conduct of the election and meeting with employees regarding reports that the Union and/or its agents had threatened to call immigration if they did not support the Union.

Finally, the Hearing Officer appeared to place no weight on Mr. Garay's testimony because "there is no evidence that [Ms.] Rodriguez was speaking on behalf of the Union or that [Mr.] Garay perceived her to be speaking on behalf of the Union." (HOD 6, ¶ 4) However, in *Overnite Transportation v. NLRB*, 104 F.3d 109, 113 (D.C. Cir. 1997), the Court held that a union may create an agency relationship either by directly designating someone to be its agent (i.e. granting "actual authority") **or** by taking steps that lead third persons reasonably to believe that the putative agent was authorized to take certain actions (i.e. allowing "apparent authority" to exist). *See also Tuf-Flex Glass*, 715 F.2d at 296 (7th Cir. 1983); *NLRB v. Truck Drivers Local Union 449*, 728 F.2d 80, 86 (2d Cir. 1984); *NLRB v. L & J Equipment Co., Inc.*, 745 F.2d 224, 232-33 (3rd Cir. 1984); *NLRB v. Georgetown Dress Corp.*, 537 F.2d 1239, 1244 (4th Cir. 1976). In *Uniroyal Technology Corporation, Royalite Division v. NLRB*, 98 F.3d 993 (7th Cir. 1996), the Court looked to factors such as whether the union had paid for any of the alleged agent's activities, whether other employees thought the individual was a union agent, whether the individual had substantial union responsibilities, and whether the union had otherwise manifested an intent to have the person act on its behalf. 98 F.3d at 999-1000. Here, the Hearing Officer found that that Ms. Rodriguez "was employed by the Union on June 1 and remained an employee until about June 21 and that her sole duties were to attempt to win the support of unit employees in the June 19 election." (HOD 8, ¶ 2) The Hearing Officer further found that "she was the principal contact between the Union and the unit employees and worked full-time at this task after she was hired by the Union." (HOD 8, ¶ 2) Because the Hearing Officer properly concluded that Ms. Rodriguez "was the Union's agent during the time she was employed by the

Union" under an actual authority theory, (HOD 8, ¶ 2) the Employer did not need to prove agency under an apparent authority theory.

Accordingly, based on the foregoing, the Regional Director's credibility resolution concerning Mr. Garay was clearly erroneous, contrary to officially reported Board precedent and resulted in prejudicial error. (RDD 4, ¶ 1)

4. Ademar Raza Was an Agent of the Union and Threatened Elvia Contreras With Job Loss If She Didn't Support the Union

a. The Hearing Officer properly credited Elvia Contreras's testimony, but erred in finding that Ademar Raza did not have apparent authority to act on behalf of the Union

It is undisputed that maintenance associate Elvia Contreras had two conversations with pro-Union maintenance associate Ademar Raza regarding the Union at Market Street. The first conversation occurred in May. (Tr. 218) During this conversation, Mr. Raza, asked Ms. Contreras "if [she] was going to vote for the Union?" Ms. Contreras responded "No." (Tr. 218) Mr. Raza asked her "why" and said "if you don't vote for the Union, in the end when the Union come[s] in, we're going to get you out of a job." (Tr. 218)

The second conversation occurred in June. (Tr. 218, 222) At the time of this conversation, Ms. Contreras believed Mr. Raza knew she didn't support the Union. (Tr. 219, 222-223) During this conversation, Mr. Raza told Ms. Contreras he was going to be the president of the Union, and that he would "terminate [her] first" if she didn't vote for the Union. (Tr. 219, 222-223) In the context of this campaign, and in light of Ms. Contreras's other conversations with co-workers and the Union's President Olga Miranda regarding threats related to immigration/deportation (see Section II.A.7) an employee hearing these statements would reasonably believe that Mr. Raza was referring to Ms. Contreras's immigration status. Furthermore, an employee hearing these statements would reasonably believe that Mr. Raza was acting on behalf of the Union when he made these threats and/or that he had the power to carry out these threats by virtue of his purported position with the Union. **The Union offered no testimony to rebut Ms. Contreras's testimony.**

Ms. Contreras's testimony concerning Mr. Raza was corroborated by another maintenance associate at Market Street, Ana Maraego. Ms. Maraego testified that approximately two weeks prior to the election, Ms. Contreras told her that three persons had harassed her. (Tr. 226) Ms. Contreras stated that one of them told her that "if she didn't vote for the Union they were going to kick her out." (Tr. 226) Ms. Maraego further testified that Ms. Contreras told her she was worried. [10] (Tr. 226) Accordingly, the Regional Director's adoption of the Hearing Officer's finding that Ademar Raza did not have apparent authority to act on behalf of the Union was clearly erroneous and resulted in prejudicial error. (RDD 3, fn. 2)

5. Tonisha Tillman Threated Employees In The Presence of Union Agent Soga Eneliko That The Union Would Call Immigration If They Did Not Support the Union

a. Silvia Estevez's testimony concerning Tonisha Tillman is undisputed

Silvia Estevez testified that approximately one month prior to the election, Ms. Tillman told her and other maintenance associates at Pine Street that "if [they] didn't vote for the Union that people that didn't have their documents in order might be terminated" and "replaced by people from the Union." (Tr. 261-264) Ms. Tillman made these statements in the presence of Mr. Quarles and Union agent Mr. Eneliko. (Tr. 263-264) Ms. Tillman continued to repeat these threats on almost a **daily basis** up until one week prior to the election. (Tr. 264) There is no evidence that Mr. Eneliko stated that Ms. Tillman was incorrect, or attempted to disavow her statements in front of Ms. Estevez. Following Ms. Tillman's statements, at least one other maintenance associate at Pine Street expressed concerns about her immigration documents to Ms. Estevez. (Tr. 262-263) **The Union offered no testimony to rebut Ms. Estevez's testimony.**

[10] On direct examination, counsel for the Employer attempted to elicit additional details about what Ms. Contreras told Ms. Maraego. The Hearing Officer sustained counsel for the Union's objection, stating it was "double hearsay". (Tr. 228) Ms. Maraego should have been permitted to answer questions, as her testimony establishes dissemination among voting unit employees of the Union and/or agent's statements relating to immigration/deportation. *See e.g.*, *Q.B. Rebuilders, Inc.*, 312 NLRB at 1141, fn. 3 (1993). The Hearing Officer's evidentiary ruling on this point during the hearing was clearly erroneous, contrary to officially reported Board precedent and resulted in prejudicial error.

b. The Hearing Officer's failure to consider Ms. Tillman's threats as evidence in support of Objection 1 was clearly erroneous, contrary to officially reported Board precedent and resulted in prejudicial error

The Hearing Officer improperly addressed Ms. Tillman's threats under the Board's third party standard, which the Regional Director affirmed without explanation. (HOD 15, ¶ 1; RDD 4, ¶ 1) The Board has held that threats made by pro-union employees are attributable to the Union if they are made in the presence of Union agents and the agents do not "disavow" the statements or conduct. *Bristol Textile Co.*, 277 NLRB 1637 (1986). The fact that the comments are not intended to be overheard by other employees is irrelevant. *Id.* Accordingly, where, as here, Ms. Tillman made these statements in the presence of Union agent Mr. Eneliko and there is no evidence that Mr. Eneliko disavowed Ms. Tillman's statements, Ms. Tillman's statements should be attributable to the Union. The Hearing Officer's failure to consider Ms. Tillman's threats as evidence in support of Objection 1 was clearly erroneous, contrary to officially reported Board precedent and resulted in prejudicial error.

c. The Hearing Officer conclusion that Ms. Tillman's statements were an effort to convince people not to vote for the Union was clearly erroneous, contrary to officially reported Board precedent and resulted in prejudicial error

The Hearing Officer concluded that Ms. Tillman's statements were an effort to convince people not to vote for the Union because of "the substance of what [Ms.] Estevez heard [Ms. Tillman] say, her selection by the Employer as one of its observers, and the failure of the Employer to call [Ms. Tillman] as a witness." (HOD 15, ¶ 1) The Hearing Officer apparently drew an adverse inference from the Employer's decision not to call Ms. Tillman. However, the Board has long held that being designated as an election observer does not make one an agent. *D.E.O. Enterprises, Inc.*, 309 NLRB 578 (1992). The Board has also stated, "Generally, employees are not presumed to be favorably disposed toward any party and no adverse inference is drawn against a party for not calling an employee witness." NLRB Guide for Hearing Officers, *citing Torbitt & Castleman Inc.*, 320 NLRB 907, 910, fn.6 (1996). Rather, the Board considers

whether witnesses were equally available to both sides as a factor in determining whether an adverse inference is appropriate. *Irwin Industries*, 325 NLRB at 811. Here, Ms. Tillman was equally available to the Union and the Union offered no testimony to rebut Ms. Estevez's testimony concerning Ms. Tillman's threatening statements. In addition, Ms. Estevez's testimony was also corroborated by Mr. Pineda, who testified that prior to the petition being filed he overheard Mr. Eneliko discussing with other employees that he was going to "intimidate" employees by threatening to "call immigration to see if they could convince [employees] from that angle". (Tr. 276-277) It would defy logic for the Employer to call Ms. Tillman as their own witness, where the Employer, in investigating potential objections to the conduct of the election, discovered that Ms. Tillman apparently supported the Union (not the Employer) in the election and was responsible for threatening employees in the weeks preceding the election. (Tr. 261-264) Thus, Ms. Tillman cannot be presumed to be favorably disposed towards the Employer at the time of the Hearing. Accordingly, the Hearing Officer's conclusion that Ms. Tillman's statements were an effort to convince people not to vote for the Union was clearly erroneous, contrary to officially reported Board precedent, and resulted in prejudicial error. (HOD 15, ¶ 2)

6. <u>There Is No Evidence that the Employer Contributed to the Rumor and/or that the Employer Told Employees the Union Would Call Immigration</u>

There was no testimony from any employee witnesses that the Employer ever told employees that the Union would call immigration. Union President Olga Miranda did, however, offer double hearsay in support of her contention that the Employer (not the Union) was responsible for spreading this rumor. Ms. Miranda claimed that an unidentified employee told her during a Union meeting that a "company PR person that was having these mandatory meetings was threatening with ICE" and that the employee asked Ms. Miranda "was it true? What Equinox was saying, that should the Union come in, ICE would be called?" (Tr. 58-59) Not only was Ms. Miranda's testimony double hearsay which should be accorded no evidentiary weight, but her testimony was directly contrary to one of the Union's own witnesses, Ms. Matthews. Ms. Matthews testified that an employee named Guillermo (who Ms. Miranda

admitted was a *pro-Union employee*) asked Ms. Miranda during a Union meeting "do you contact ISIS [sic]?" (Tr. 41, 324, 335) Glaringly absent from Ms. Matthews's testimony was any reference to a company PR person and/or that the Company told employees the Union would contact ICE. (Tr. 325, 335-336) The truth of the matter is that it was the Union and its agents who were responsible for publishing and disseminating this rumor that the Union would call immigration if voting unit employees did not support the Union.

7. Union President Olga Miranda Threatened, Intimidated, Harassed and/or Coerced Voting Unit Employees By Telling Voting Unit Employees The Company Was Threatening to Call Immigration

Ms. Contreras testified that approximately two days prior to the election, Union President Olga Miranda contacted her by telephone to introduce herself. (Tr. 209) During this telephone conversation, Ms. Miranda told her the Company "was threatening to bring immigration in" and that she wanted to meet with her "to get support for the Union." (Tr. 209) Ms. Contreras responded that she did not want to meet with Ms. Miranda and told Ms. Miranda her "vote was personal." As no supervisor from Equinox ever told her they were going to contact immigration, Ms. Contreras responded, "I never heard anything about [the Company] threatening to bring in immigration." (Tr. 210, 221)

Approximately one day prior to the election, Ms. Contreras told another co-worker named Leo what she heard from Ms. Miranda. (Tr. 211, 217) Ms. Contreras asked Leo "why are people saying that the Company's threatening to bring immigration in?" (Tr. 210) Leo responded that the "Union's not going to bring in immigration, the Company will." (Tr. 211, 217)

In the context of this campaign, an employee hearing these statements would reasonably believe that the Company was threating to call immigration and that the Union may have some ability to protect them. Accordingly, the Hearing Officer's failure to find that Ms. Miranda's statements were made to cause confusion among the voting group and create an atmosphere of fear and reprisal was clearly erroneous and resulted in prejudicial error. (HOD 8, ¶ 4)

B. Applicable Board Law Supporting Objection 1

The Regional Director's Decision largely adopted the Hearing Officer's findings concerning Objection 1 without any further reasoning or explanation. (HOD 4, ¶ 1) Contrary to the Hearing Officer's Report, there is overwhelming evidence that Union agents engaged in objectionable conduct during the critical period, to threaten and intimidate employees to support the Union or the Union would call immigration. The Board has found even a single threat of this character by a union organizer sufficient to warrant setting aside an election. *See Professional Research, Inc., d/b/a Westside Hospital*, 218 NLRB 96 (1975). As the Board noted, the "test to be used to determine whether Respondent's [union's] conduct destroyed the laboratory atmosphere necessary to the exercise of free choice in the election, basically, is whether that conduct was coercive and also had a tendency to affect or interfere with the employees' actions at the polls." *Id.* at 96. The Board, reversed the ALJ's findings that "the conduct probably did not affect any employee other than an employee who was threatened with deportation because (1) there is no evidence of illegal entry into the United States by any other employee, and there is a similar absence of evidence that any other employee was threatened with deportation, and (2) none of the five or eight Spanish-speaking employees who were aware of the threat were affected in their election choice since there is no objective evidence to indicate that they were in fact coerced, but, if they were, their votes nevertheless 'would not be decisive to alter the election results.'" *Id.* at 96. The Board concluded that the ALJ's findings constituted improper bases on which to evaluate the nature of the conduct involved and the tendency of its effect on employees' free choice. Rather, the Board concluded that the question of whether there has been unwarranted interference with free expression of choice does not turn on election results, or the probable election results. *Id.* at 96. Moreover, the impact of the threat is not necessarily limited to the one employee who was threatened, since experience has shown, that statements made during an election campaign are the subject of discussion, repetition, and dissemination among the voters. Notably, this conduct does not lose coercive tendency merely because of an absence of direct evidence showing that some employees are undocumented workers, or that those

employees aware of that conduct were not in fact coerced. The absence of such evidence hardly indicates that such conduct has no tendency to affect their actions at the polls. The Hearing Officer's failure to consider *Westside Hospital* in making his recommendation concerning Objection 1 was clearly erroneous, contrary to officially reported Board precedent and resulted in prejudicial error.

Here, the margin in the instant election was much closer than *Westside Hospital*, as the tally of ballots was 41 cast for the Union; and 33 against the Union—**a total of four votes decided this election**. Moreover, 40-50% of the voting employees are Hispanic. While the Regional Director's noted the closeness of the election results in his decision, he appeared to give it no significant weight, claiming that the margin of victory is not the "predominant consideration" and thus departing from officially reported Board precedent. (RDD 6, ¶ 3) Objections must be carefully scrutinized in close elections. *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995); *Colquest Energy, Inc. v. NLRB*, 965 F.2d 116, 122 (6th Cir. 1992). The Board has set aside elections where, as here, threats have been made or disseminated to voters whose ballots might have been determinative. *See Steak House Meat Co.*, 206 NLRB 28 (1973); *Buedel Food Products Co.*, 300 NLRB 638 (1990); *Smithers Tire*, 308 NLRB 72 (1992). There is no question that the threats were disseminated as evidenced by the number of employee witnesses who testified. Moreover, the evidence establishes that the threats destroyed the laboratory conditions necessary to exercise free choice in the election.

1. The Pre-Petition Plan

Mr. Pineda's testimony established that Ms. Matthews, Ms. Rodriguez and Mr. Eneliko devised a plan early on to bring in the Union and to persuade employees "one way or another" to support the Union. More specifically, the record evidence establishes these individuals said they were going to "intimidate" employees by "threatening to call immigration to see if they could convince [employees] from that angle." (Tr. 276-277) The plan began in the pre-petition period but was implemented during the critical period. As noted above, Mr. Pineda's testimony is

relevant to show that Ms. Rodriguez, Ms. Matthews and Mr. Eneliko had a motive and developed a plan to threaten, intimidate, harass and/or coerce voting unit employees by telling them they would call immigration. Likewise, Mr. Pineda's testimony is relevant to substantiate and/or corroborate other employee witnesses who testified that Ms. Rodriguez, Ms. Matthews and Mr. Eneliko made similar threatening statements to them concerning immigration and/or losing their job during the critical period.

2. Threats Regarding Immigration by Union Agents

The evidence establishes that numerous Union agents threatened to contact immigration if employees did not support the Union. In addition to Ms. Rodriguez, Ms. Matthews and Mr. Eneliko's pre-petition statements, the evidence establishes Ms. Rodriguez threatened one voting unit employee on at least two occasions during the critical period that "if the Union lost, she was going to take it upon herself to bring immigration in." (Tr. 181-182) Contrary to the Hearing Officer's Report (HOD 8, ¶ 4), this threat was disseminated to at least three other voting unit employees at Market Street in the lunch room. (Tr. 186, 188, 195) Furthermore, as Board law makes clear, these statements made during the election campaign were reasonably likely the subject of discussion, repetition, and further dissemination among the voters. *Westside Hospital*, 218 NLRB 96. Indeed, the record reflects numerous statements and questions from other voting unit employees concerning immigration, which in all likelihood, arose because of Ms. Rodriguez, Ms. Matthews and Mr. Eneliko's statements to voting unit employees (whether they were pre-, or post-petition.)[11] (Tr. 186, 188, 195, 201, 218, 261-264, 278-279) In addition, while one of the voting unit employees told Mr. Garay he "didn't believe it," (Tr. 187) this employee was not an agent of the Union and could not have canceled out the coercive effects of Ms. Rodriguez's statement, as the Hearing Officer contends. (HOD 8, ¶ 4) To the contrary, the

[11] For example, a maintenance associate at Market Street, Esther Paniagua testified that approximately two weeks prior to the election, maintenance associate Minerva Becerra asked her "if the Union is going to win or loss they're going to call immigration either way?" (Tr. 201) Ms. Paniagua responded "I don't know." (Tr. 201)

objective evidence indicates that Mr. Garay was in fact coerced, as demonstrated by Mr. Pineda's testimony that Mr. Garay told Mr. Pineda "he was afraid and concerned" "that immigration would come in." (Tr. 278-279)

In addition, the record evidence establishes that starting approximately one month prior to the election and continuing on almost a daily basis up until one week prior to the election, Ms. Tillman told Ms. Estevez and other maintenance associates at Pine Street that "if [they] didn't vote for the Union that people that didn't have their documents in order might be terminated" and "replaced by people from the Union." (Tr. 261-264) Ms. Tillman made these statements in the presence of Union agent Mr. Eneliko. (Tr. 263-264) Following these statements, at least one other maintenance associate at Pine Street expressed concerns about her immigration documents to Ms. Estevez. (Tr. 262-263) Accordingly, where, as here, Ms. Tillman made these statements in the presence of Union agent Mr. Eneliko and there is no evidence that Mr. Eneliko disavowed Ms. Tillman's statements, Ms. Tillman's statements are attributable to the Union. *Bristol Textile Co.*, 277 NLRB at 1637.

Further, the record evidence establishes that Ms. Contreras had two conversations with Union agent Mr. Raza regarding the Union at Market Street. The first conversation occurred in May. (Tr. 218) During this conversation, Mr. Raza, asked Ms. Contreras "if [she] was going to vote for the Union?" Ms. Contreras responded "No." (Tr. 218) Mr. Raza asked her "why" and said "if you don't vote for the Union, in the end when the Union come[s] in, we're going to get you out of a job." (Tr. 218) The second conversation occurred in June. (Tr. 218, 222) At the time of this conversation, Ms. Contreras believed Mr. Raza knew she did not support the Union. (Tr. 219, 222-223) During this conversation, Mr. Raza told Ms. Contreras he was going to be the president of the Union, and that he would "terminate [her] first" if she did not vote for the Union. (Tr. 219, 222-223) Mr. Raza's threat was disseminated to at least one other voting unit employee, Ms. Maraego. (Tr. 226) In the context of this campaign, in light of the testimony of other employees regarding threats related to immigration/deportation an employee hearing these statements would reasonably believe that Mr. Raza was referring to Ms. Contreras's immigration

status and that Mr. Raza was acting on behalf of the Union when he made these threats and/or that he had the power to carry out these threats by virtue of his purported position with the Union. Furthermore, contrary to the Hearing Officer's Report, (HOD 15, ¶ 4), the fact that the election was conducted by a secret ballot does not lessen the coercive effect of Mr. Raza's statements since Ms. Contreras believed Mr. Raza knew she did not support the Union at the time he made these statements to her. (Tr. 219, 222-223) Likewise, the Hearing Officer's presumption that "the Union would [not] take any retaliatory action if it won" is without any basis in fact or in law. (HOD 15, ¶ 4) If that presumption was applied in the converse situation, it would not be objectionable for an Employer to threaten to fire key union supporters as long as it added the phrase "and the Employer wins in the election." Adding that wording does not suddenly render the threat any less coercive or credible as the Hearing Officer contends.

Finally, the record evidence establishes that Union President Olga Miranda contacted Ms. Contreras approximately two days prior to the election to cause confusion among the voting group and create an atmosphere of fear and reprisal. Ms. Contreras testified that approximately two days prior to the election, Ms. Miranda told her the Company "was threatening to bring immigration in." (Tr. 209) As no supervisor from Equinox ever told Ms. Contreras they were going to contact immigration, Ms. Contreras responded, "I never heard anything about [the Company] threatening to bring in immigration." (Tr. 210, 221) Approximately one day prior to the election, Ms. Contreras told another co-worker named Leo what she heard from Ms. Miranda. (Tr. 211, 217) In the context of this campaign, an employee hearing these statements would reasonably believe that the Company was threating to call immigration and that the Union may have some ability to protect them. Accordingly, Ms. Miranda made these statements to cause confusion among the voting group and create an atmosphere of fear and reprisal.

Based upon the foregoing, the Employer has sustained its burden on Objection 1. Thus, the Regional Director's failure to set aside the election and direct a new election based on Objection 1 was clearly erroneous, departs from established Board precedent, and resulted in prejudicial error.

III. THE ELECTION SHOULD BE SET ASIDE BASED UPON UNION SUPPORTER'S THREATS OF JOB LOSS AND DEPORTATION (OBJECTION # 5)

Employer's Objection #5 states:

> By the conduct described above and other conduct, the Union, through its officers, employees, agents, authorized representatives and others acting on its behalf and/or with its apparent authority, actual or implied endorsement or ratification, has interfered with and coerced eligible voters with regard to the exercise of their section 7 rights under the National Labor Relations Act and destroyed the atmosphere necessary to conduct a fair election through the Board's standards and/or third party standard. The above coercive acts and other conduct taking place during the critical pre-election and actual voting period were sufficient to unlawfully affect the results of the election.

A. Evidence Relevant to Objection 5

The evidence with respect to this issue is the same as the evidence discussed under Objection #1.

B. Applicable Board Law Supporting Objection 5

The Regional Director's Decision largely adopted the Hearing Officer's findings concerning Objection 5 without any further reasoning or explanation. (HOD 4, ¶ 1) However, contrary to the Hearing Officer's Report, even assuming *arguendo* the Board finds that Ms. Rodriguez, Ms. Mathews, Mr. Eneliko, and/or Mr. Raza were not agents of the Union, there is sufficient evidence to set aside the election under the NLRB's third party standard. The standard for overturning the election under these circumstances is as follows:

> Under longstanding precedent, the Board will set aside an election because of the conduct of third parties if the conduct creates a general atmosphere of fear and reprisal that renders a fair election impossible. *Westwood Horizons Hotel,* 270 NLRB 802, 803 (1984). In determining whether a threat is serious and likely to intimidate prospective voters to cast their ballots in a particular manner, the Board evaluates not only the nature of the threat itself, but also whether the threat encompassed the entire bargaining unit; whether reports of the threat were disseminated widely within the unit; whether the person making the threat was capable of carrying it out, and whether it is likely that the employees acted in fear of his capability of carrying out the threat; and whether the threat was "rejuvenated" at or near the time of the election. *Id.* (Citations omitted.)

Accubilt, Inc. 340 NLRB 1337 (2003); (adopting *Westwood* standard). The Board looks at whether a general atmosphere of fear and reprisal existed in the employer's facility, rather than merely comparing the number of employees subject to any sort of threats against the vote margin. *Id.* The critical question is whether the conduct prevented a free election:

> It is not material that fear and disorder may have been created by individual employees or nonemployees and that their conduct cannot probatively be attributed either to the Employer or to the Union. The significant fact is that such conditions existed and that a free election was thereby rendered impossible. Similarly, as the Fourth Circuit concluded in *Methodist Home v. NLRB*:
>
> If the conduct, though that of a mere Union adherent and not that of a Union agent or employee, is sufficiently substantial in nature to create a general environment of fear and reprisal such as to render a free choice of representation impossible, then it will require the voiding of the election.

YKK, Inc., 269 NLRB 82, 83 (1984).

Contrary to the Hearing Officer's analysis (HOD 16, ¶ 4), the Board has set aside elections based on deportation threats under the third party standard. *See e.g.*, *Robert Orr-Sysco Food Services*, 338 NLRB 614, 615-616 (2002). There, the Board relied in part on *Q. B. Rebuilders, Inc.*, 312 NLRB 1141, 1142 (1993), which found that that a deportation-related threat to call immigration – even one uttered in jest – constitutes a serious threat of economic and emotional harm. The Board also relied on *Crown Coach Corp.*, 284 NLRB 1010 (1987), where the Board found that threats of deportation are serious because they convey the warning that employees risk not just job loss, "but also the loss of their homes and possibly even separation from their families by failing to support the union." Additionally, the Board in *Robert Orr-Sysco Food Services* addressed and distinguished the case cited by the Hearing Officer, *Mike Yurosek*, where threats and rumors of deportation were held not to be enough to set aside an election under the third party standard. In *Mike Yurosek*, 225 NLRB 148 (1976), the Board stated that it "doubted" whether the threats and rumors of deportation so exacerbated illegal alien employees' natural fears of deportation as to render them incapable of a free election choice. *Id*. at 150. In distinguishing *Mike Yurosek*, the Board in *Robert Orr-Sysco Food Services* explained that "the

Board in *Mike Yurosek* placed primary emphasis on the 'substantial efforts' that had been made to contradict the threats, lessening their impact, and found that 'no such effort was made here.'" As such, the Board in *Robert Orr-Sysco Food Services* overturned the results of the election. Likewise, in this case, there were no efforts by the Union to contradict the threats (as opposed to fomenting them), and the Employer was not aware of any such threats at the time.

Thus, under *Robert Orr-Sysco Food Services*, even if the Board concludes that Ms. Rodriguez, Ms. Mathews, Mr. Eneliko, and/or Mr. Raza were not agents of the Union, their misconduct during the critical period, and on the day of the election clearly had a coercive impact on the voters and destroyed the laboratory conditions necessary to exercise free choice in the election. These individuals acted as third parties whose conduct made a fair election impossible. There can be no question that voting unit employees genuinely feared not only the loss of their jobs, but also that they would be separated from their families because they would be deported. The overwhelming testimony establishes that this misconduct was not an "isolated" incident but was pervasive and ongoing throughout the critical period. While it is unclear whether the threats regarding immigration/deportation "encompassed the entire unit" as the Hearing Officer makes note of (HOD 16, ¶ 3), the evidence certainly establishes they were widely known to the employees at Market and Pine Street.

Based upon the foregoing, the Employer sustained its burden on Objection 5. Thus, the Regional Director's failure to set aside the election and direct a new election based on Objection 5 was clearly erroneous, contrary to officially reported Board precedent and resulted in prejudicial error.

IV. THE ELECTION SHOULD BE SET ASIDE BASED UPON JARED QUARLES AND SOGA ENELIKO'S MISCONDUCT (OBJECTION # 2 AND #5)

Employer's Objection #2 states:

> During the critical period preceding the Election and/or during the Election, the Union, through its officers, employees, agents, authorized representatives and others acting on its behalf and/or with its apparent authority, actual or implied endorsement or ratification, threatened,

intimidated, harassed coerced and extorted voting unit employees by having an employee show voting unit employees a firearm, telling voting unit employees the firearm was for anyone who "fucked with him", and telling employees he would report allegations of employee theft and misconduct to the Employer if they did not vote "Yes" or for the Union in the Election. Following the above conduct, the same employee served as the Union's election observer in order to intimidate and coerce employees into voting "Yes" or for the Union in the Election. Such conduct had a coercive impact on eligible voters, destroyed the laboratory conditions required in Board elections and improperly affected the results of the election.

A. Evidence Relevant to Objection 2

1. Jared Quarles Intimidated, Harassed, Coerced and Extorted Voting Unit Employees By Showing Voting Unit Employees a Firearm, Telling Voting Unit Employees The Firearm Was "In Case Any Fuckers Want To Get Crazy", and Telling An Employee He Would Report Allegations of Employee Theft and Misconduct To the Employer If He Did Not Vote For The Union; Soga Eneliko Similarly Threatened An Employee He Would Report Allegations of Employee Theft and Misconduct To The Employer If He Did Not For the Union

a. Erik Fernandez's testimony regarding Soga Eneliko and Jared Quarles

Area Maintenance Manager Erik Fernandez testified that on June 15, a voting unit employee ("the Employee") approached him to report that he was being harassed by former employee and Union agent Soga Eneliko. (Tr. 148) In particular, the Employee reported he was receiving multiple text messages and phone calls from Mr. Eneliko in regards to some misconduct the Employee had allegedly engaged in, including drinking on the job and stealing company property. (Tr. 148, 150-151) The Employee told Mr. Fernandez that Mr. Eneliko called him a rat and was trying to single him out as the person who may have ratted out a group of former employees for drinking on the job. (Tr. 151) The Employee told Mr. Fernandez that Mr. Eneliko threated to turn him in and get him fired if he did not support the Union. (Tr. 152)

Mr. Fernandez testified that a few minutes later, the Employee told him that he was also being harassed by Jared Quarles. (Tr. 152-153) In particular, the Employee said he felt uncomfortable and intimidated by Mr. Quarles's presence in the building operations office at

Market Street. (Tr. 153) The Employee also said that Mr. Quarles was "crazy" and that he carried a gun to work. The Employee further reported that Mr. Quarles waived the gun around at work.[12] (Tr. 154)

Mr. Fernandez immediately reported what the Employee told him to the Employer's Market Street General Manager Patrick Ahern and Assistant General Managers Heather McClure and Chris Panza. (Tr. 156) Mr. Fernandez and Mr. Panza then went to the building operations office on the third floor to see if they could locate the gun. (Tr. 156) Mr. Fernandez saw a black backpack on the couch, which he recognized to be Mr. Quarles's backpack. Mr. Fernandez searched the contents of the backpack and located a gun inside a black case. (Tr. 156, 166; E. Exh. 1) The gun was metallic with a black grip. (Tr. 157-158; E. Exh. 1) Mr. Fernandez reported what he and Mr. Panza found to Mr. Ahern, who in turn reported it to Mr. Gannon. (Tr. 85, 158)

Mr. Fernandez later spoke with Mr. Gannon to provide a more detailed report. During this conversation, Mr. Fernandez told Mr. Gannon the Employee had reported that Mr. Quarles threatened to turn him in for drinking on the job and stealing company property if he did not vote for the Union. Mr. Fernandez also reported that the Employee said Mr. Quarles carried a gun at work. (Tr. 85) Following his conversation with Mr. Fernandez, Mr. Gannon went to the building operations office, located the backpack in question, opened the backpack, and found the gun inside a case. (Tr. 87) At that point, Mr. Gannon called 911. (Tr. 87)

[12] On direct examination, counsel for the Employer asked Mr. Fernandez whether the Union was referenced during the Employee's discussion with Mr. Fernandez. The Hearing Officer sustained counsel for the Union's objection, stating that it was "asked and answered." (Tr. 166) Unfortunately, the Hearing Officer likely confused Mr. Fernandez's testimony concerning Mr. Eneliko with his testimony concerning Mr. Quarles. As the transcript reflects, this question was not asked and answered regarding what the Employee told Mr. Fernandez about Mr. Quarles; it was only asked and answered regarding what the Employee told Mr. Fernandez about Mr. Eneliko. (Tr. 151-152) Rather, had Mr. Fernandez been permitted to answer counsel for the Employer's question, the Employer is informed and believes that Mr. Fernandez would have testified that the Employee told him he was being harassed by the Union and that Mr. Quarles similarly threatened to turn him in for drinking on the job and stealing company property if he did not support the Union. Accordingly, the Hearing Officer's evidentiary ruling during the hearing was clearly erroneous and resulted in prejudicial error.

Two squad cards with four police officers in uniform arrived at the Market Street location at approximately 6:45 to 7:00 p.m. (Tr. 87) Mr. Gannon met the police officers on Market Street and brought them up to the main entrance of the club on the 4th floor. (Tr. 88-89) At the time the police arrived, there were approximately 12-15 maintenance associates and one building operations employee at the club. (Tr. 92-93) Mr. Gannon escorted the police officers to the building operations office on the 3rd floor. On the way to the 3rd floor, they passed two maintenance associates in uniform. (Tr. 93) The police searched the contents of the backpack, found the gun, and reported to Mr. Gannon the gun appeared to be "**cocked with two rounds**". (Tr. 95) Mr. Gannon told the police he was informed and believed it was Mr. Quarles's gun. (Tr. 96)

The police told Mr. Gannon they wanted to detain Mr. Quarles for questioning. (Tr. 96) Accordingly, Mr. Gannon escorted the police back to the 4th floor folding area, where Mr. Gannon believed Mr. Quarles was located. (Tr. 98) On the way to the 4th floor, they passed one to two maintenance associates in uniform. (Tr. 97-98) Upon locating Mr. Quarles, one of the police officers placed Mr. Quarles in handcuffs and read him his Miranda rights. (Tr. 98) The police escorted Mr. Quarles in handcuffs from the 4th floor folding area to the 3rd floor employee break room for questioning. (Tr. 98-102) On the way to the 3rd floor, they passed one to two maintenance associates in uniform. (Tr. 99)

At the police's request, Mr. Fernandez spoke with the Employee again to determine whether Mr. Quarles brandished the gun. The Employee told Mr. Fernandez that Mr. Quarles showed the gun to him and two other employees in the employee break room, waived the gun around, and told them "I got this in case any fuckers want to get crazy." (Tr. 160-161) The Employee also told Mr. Fernandez that Mr. Quarles had showed employees oil needles (which are long needles which are used to oil hinges and doors), and made similar remarks that he would use them "If anybody wants to get crazy with me." (Tr. 162) Mr. Fernandez reported what the Employee told him to Mr. Gannon and the police. (Tr. 145, 164)

During the police's questioning of Mr. Quarles, Mr. Quarles admitted it was his gun. (Tr. 102) Mr. Quarles, however, claimed it was an "air soft gun". (Tr. 102-103) The police met and conferred in the hallway together, and again inspected the gun. (Tr. 103-104) During this discussion, one of the police officers communicated that an air soft gun would have an orange tip, which the gun at issue did not have. (Tr. 103-104; E. Exh. 1) After the police inspected the gun closely for a substantial period of time and spoke to Mr. Quarles, the police eventually concluded the gun in question was an air soft gun notwithstanding its appearance, and told Mr. Gannon they could not continue to detain Mr. Quarles. (Tr. 104) Mr. Gannon responded he was confused since one of the police officers previously reported the gun was "cocked with two rounds". (Tr. 104) One of the police officers recognized the initial confusion and repeated that this air soft gun did not have an orange tip as an identifying mark. (Tr. 104-105)

Based on the following, Mr. Gannon decided to suspend Mr. Quarles pending further investigation and remove him from the property. (Tr. 106) After informing Mr. Quarles that he was suspended, Mr. Gannon and the police escorted Mr. Quarles from the 3rd floor break room to the main entrance of the club on the 4th floor. (Tr. 108-109) On the way to the 4th floor, they passed at least two to three maintenance associates in uniform, including Guillermo Mendoza and Elvia Contreras. (Tr. 109, 164, 212)

On June 17, Mr. Gannon and Regional Director of Human Resources Emerson Figueroa spoke with Mr. Quarles as part of their investigation. During this call, Mr. Quarles admitted the gun found in the building operations office was his gun and that he had brought the gun to work on at least one occasion. Mr. Quarles also admitted he showed the gun to Saul Rodriguez in the locker room. (Tr. 111, 115) Accordingly, on June 18, the Employer terminated Mr. Quarles. (Tr. 116-117)

Prior to the hearing, Mr. Fernandez and Executive Vice President Jack Gannon spoke with the Employee separately about coming forward to provide a statement. (Tr. 86, 154-155) The Employee refused to provide a statement, and told Mr. Gannon he "felt intimidated" and was "fearful of retaliation" if his name was disclosed. (Tr. 86) Likewise, the Employee told Mr.

Fernandez the Union had his information, and knew that he had children, and therefore, he did not want to "cooperate". (Tr. 155) The Employee also threated to quit his job. (Tr. 86, 155) For that reason, neither Mr. Fernandez nor Mr. Gannon disclosed the Employee's name during the hearing. (Tr. 86-87)

b. The Hearing Officer's failure to seek enforcement of the Employer's subpoena

On day two of the hearing (June 14), the Employee resigned from his position.[13] Following the Employee's resignation and after the Hearing Officer stated that Mr. Fernandez's hearsay testimony could not support an objection (Tr. 154, 172-173), the Employer was left with no choice and decided to serve the Employee with a subpoena. The Employer *successfully* served the Employee with subpoena ad testificandum A-1-NBJFIZ and the Employee did in fact appear in the atrium outside of the hearing room on June 15. The Employee informed counsel for the Employer that he was intimidated and fearful for his safety. Accordingly, at counsel for the Employer's request, the Hearing Officer ordered that the hearing room be cleared except for the Board agents and the Employer and Union's counsel and designated representatives. (Tr. 443) Following the Hearing Officer's order, counsel for the Employer approached the Employee in the atrium and requested he come into the hearing room to testify. The Employee refused counsel for the Employer's request and stated he would not comply with the subpoena.

In light of the Employee's refusal to cooperate, the Employer requested the Regional Director seek enforcement of the subpoena. During an off-the-record discussion, the Assistant Regional Director advised the parties that under the new representation rules, the Regional Director could not get involved in subpoena enforcement issues. Accordingly, following this off-the-record discussion, the Hearing Officer stated he was going to close the hearing and that there was nothing he could do to enforce the failure of the Employee to honor the subpoena. (Tr. 444;

[13] The Employee was so intimidated that he resigned during the course of the Hearing. Essentially, the Union successfully carried out its plan of fear and intimidation upon the Employee who chose to resign rather than testify and subject himself to further threats and intimidation by the Union and its agents.

HOD 10, fn. 11) The Employer objected to the Hearing Officer's ruling and requested a postponement of the hearing for the Employer and/or the Board to seek enforcement of the subpoena under Section 11(2) of the NLRA.[14] (Tr. 444-445)

c. The Regional Director's failure to delay the hearing in order to seek or permit the Employer to seek enforcement of the subpoena was clearly erroneous and resulted in prejudicial error

The Regional Director's Decision affirmed the Hearing Officer's decision not to delay the hearing in order to seek or permit the Employer to seek enforcement of the subpoena. (RDD 5, ¶ 2) In reaching this decision, the Regional Director incorrectly reasoned that even assuming Mr. Quarles threatened in one instance to report the unnamed employee's misconduct to the Employer, that threat was directed to, and involved, only the unnamed employee – an insufficient number to affect the election results. (*Id.*) The Regional Director's Decision failed

[14] Section 11(2) of the NLRA [29 USCS § 161] provides:

> **For the purpose of all hearings** and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10 [29 USCS §§ 159 and 160]—
>
> (1) Documentary evidence; summoning witnesses and taking testimony. The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. **The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application…**
>
> (2) Court aid in compelling production of evidence and attendance of witnesses. **In case of contumacy or refusal to obey a subpoena issued to any person, any district court of the United States or the United States courts** to any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, **upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof**. (Emphasis added)

to appropriately consider that only four votes decided the election, and when considered with the other objectionable conduct, this conduct reasonably could be said to have affected the outcome of the election. In addition, while it is true that the Employer is aware of only one employee who was threatened by Mr. Quarles, it is very well possible the Employee told others about Mr. Quarles's threats and/or brandishing the gun. The Employee, however, is the only witness the Employer is aware of who could speak to the dissemination of this threat among voting unit employees. Furthermore, contrary to the Regional Director's Decision, there is no evidence that the identities of the two other employee witnesses who observed Mr. Quarles brandish the gun were known to the Employer. (RDD 5, fn. 1) While Mr. Fernandez testified that the Employee told Mr. Fernandez that Mr. Quarles showed the gun to him and two other employees in the employee break room, waived the gun around, and told them "I got this in case any fuckers want to get crazy," (Tr. 160-161) there is absolutely no evidence in the record that the Employee told Mr. Fernandez the names of the two employees and/or that the Employer spoke with these employees. Finally, contrary to the Regional Director's conclusion (RDD 5, ¶ 2), Mr. Quarles's brandishing of the gun and his proclamation that "I got this in case any fuckers want to get crazy" can be reasonably linked to the election, where, as here, Mr. Quarles and Mr. Eneliko were both active union supporters and the Employee reported harassment by Mr. Quarles *and* Mr. Eneliko in the same conversation to Mr. Fernandez. Thus, adjourning the hearing for the time necessary to obtain enforcement of the subpoena and possibly further proceedings to compel the witness's testimony would have resolved relevant issues to Objection 2. The Regional Director's failure to do so was clearly erroneous and resulted in prejudicial error.

Mr. Fernandez's testimony should have been admitted to show the impact on the Employee and the Employee's then existing state of mind under Federal Rule of Evidence 803(3) – i.e., that he felt harassed by Union agent Mr. Quarles. Alternatively, given the Employee's refusal to comply with the Subpoena and the Regional Director's effective denial of the Employer's ability to seek enforcement of the subpoena, the Regional Director should have admitted Mr. Fernandez's testimony for the truth of the matter asserted under Federal Rule of

Evidence 804 and/or 807. These statements are sufficiently reliable and trustworthy insofar as the Employee refused to comply with the subpoena stating that he was intimidated and fearful for his safety (thus likely indicating that he was in fact threatened by Mr. Quarles and Mr. Eneliko) and the Employer actually **found the gun in the building operations office** as the Employee had told Mr. Fernandez. Thus, the Regional Director's failure to consider Mr. Fernandez's testimony for the truth of the matter asserted was clearly erroneous and resulted in prejudicial error.

B. Applicable Board Law Supporting Objection 2

1. The Election Should be Set Aside Based Upon Soga Eneliko Telling A Voting Unit Employee He Would Report Allegations of Employee Theft and Misconduct to the Employer If He Did Not Vote for the Union

Contrary to the Hearing Officer's Report (HOD 10, ¶ 3), the evidence establishes that Soga Eneliko threatened to expose misconduct by an employee and get him terminated if he did not vote for the Union. Mr. Fernandez testified that on June 15, a voting unit employee (previously referred to as "The Employee") approached him to report that he was being harassed by former employee and Union agent Soga Eneliko. (Tr. 148) In particular, the Employee reported he was receiving multiple text messages and phone calls from Mr. Eneliko in regards to some misconduct the Employee had allegedly engaged in, including drinking on the job and stealing company property. (Tr. 148, 150-151) The Employee told Mr. Fernandez that Mr. Eneliko called him a rat and was trying to single him out as the person who may have ratted out a group of former employees for drinking on the job. (Tr. 151) The Employee told Mr. Fernandez that Mr. Eneliko threated to turn him in and get him fired if he did not support the Union. (Tr. 152)

There is no question that the Employee believed Mr. Eneliko would carry out his threat of job loss simply by reporting the Employee's purported misconduct. Generally, the Board has found that threats of termination or job loss by union supporters to be protected under the NLRA. Those decisions, however, turned on the Board's finding that the speaker was *not* in a position to

enforce the threats but that instead, the employees were merely debating "the pros and cons of union representation." *NLRB v. Arkema, Inc.*, 710 F.3d 308 (5th Cir. 2013). "Indeed, the Board has held that even job-loss threats from union representatives themselves would not necessarily void an election because such a threat would, in the ordinary circumstance, be 'illogical': 'employees could be expected to conclude that the Employer would not fire employees who aided its cause' by voting against representation. *NLRB v. Downtown BID Servs. Corp.*, 682 F.3d 109 (D.C. Cir. 2012), quoting, *Underwriters Lab., Inc.*, 323 NLRB 300, 302 (1997), enforced, 147 F.3d 1048 (9th Cir. 1998); *see Janler Plastic Mold Corp.*, 186 NLRB, 540, 540 (1970) (finding job-loss threats from a union unobjectionable); *c.f. Lyon's Rest.*, 234 NLRB 178, 179 (1978) (finding that a reasonable person could have believed threats of job loss because a unique "prior bargaining history between the [e]mployer and [the union's] sister local [union]" meant that the threats "carried a sufficient ring of plausibility"); *See e.g. NLRB v. Valley Bakery, Inc.*, 1 F.3d 769 (9th Cir. 1993) (distinguishing threats of job loss aimed at pro-union employees from threats of job loss aimed at all employees). In the instant case, the evidence demonstrates that the Employee could plausibly have believed that Mr. Eneliko had the ability to carry out his threat by reporting the alleged misconduct. Accordingly, the Hearing Officer's finding that the Employer offered no competent evidence that Mr. Eneliko threatened to expose misconduct by an employee and get him terminated if did not vote for the Union was clearly erroneous, contrary to officially reported Board precedent and resulted in prejudicial error. (HOD 10, ¶ 3)

2. <u>The Election Should be Set Aside Based Upon Jared Quarles Telling A Voting Unit Employee He Would Report Allegations of Employee Theft and Misconduct to the Employer If He Did Not Vote for the Union, Showing Voting Unit Employees a Gun, and Telling Voting Unit Employees the Gun Was "In Case Any Fuckers Want to Get Crazy"</u>

Even *assuming arguendo*, the Board does not find Mr. Quarles to be an agent of the Union, Mr. Quarles acted as a third party whose conduct made a fair election impossible. The results of the election should be overturned based on Mr. Quarles's threats of violence and job loss. *Accubilt, Inc.* 340 NLRB at 1337; *Westwood Horizons Hotel,* 270 NLRB at 803; *YKK, Inc.*,

269 at 83. The evidence establishes Mr. Quarles unlawfully interfered with the employees' free choice in the election when just **four days prior to the election** Mr. Quarles told the Employee he would report allegations of employee theft and misconduct to the Employer if the Employee did not vote for the Union. (Tr. 85-87, 152-153) The evidence also establishes Mr. Quarles showed a gun to the Employee and two other voting unit employees in the employee break room and told them the gun was "in case any fuckers want to get crazy". (Tr. 85-87, 111, 115, 152-154, 160-161) In the context of this campaign, and in light of Mr. Quarles's known pro-Union sympathies (Tr. 40-41), an employee hearing these statements would reasonably believe that Mr. Quarles was referring to employees who did not want to vote for the Union, not to any "crazies on the streets of San Francisco" as the Hearing Officer contends. (HOD 10, fn. 11) The fact that the gun turned out to be an air soft gun is irrelevant, where, as here, the gun appeared to be a real gun (so much so that the police believed it to be one even after a close inspection), and there is no evidence that any voting unit employee learned it was an air soft gun prior to the election.[15] (E. Exh. 1) The evidence further establishes Mr. Quarles showed employees oil needles and made similar remarks that he would use them "If anybody wants to get crazy with me." (Tr. 162)

[15] California Penal Code 20170 mandates, "No person may openly display or expose any imitation firearm in a public place." An "imitation firearm" includes "any BB device, toy gun, replica of a firearm, or other device that is so substantially similar in coloration and overall appearance to an existing firearm as to lead a reasonable person to perceive that the device is a firearm." California Penal Code 16700. California Penal Code 20170 does not apply when the imitation firearm is in its original package or if the exterior of the imitation firearm is predominately colored, "white, bright red, bright orange, bright yellow, bright green, bright blue, bright pink or bright purple." California Penal Code 20175. The law proceeds to further state that merely having an orange tip on the muzzle corresponding to what federal law mandates is simply not satisfactory to California's personal requirement. *Id.* Likewise, it is illegal for "Any person who changes, alters, removes, or obliterates any coloration or markings that are required by any applicable state or federal law or regulation, for any imitation firearm…in a way that makes the imitation firearm or device look more like a firearm." California Penal Code 20150.

In its brief in support of Exceptions, the Employer requested the Regional Director take judicial notice of the many recent police incidents with individuals carrying air-soft guns. For example, in January, 2014, a man carrying a disassembled air-soft gun in his car was shot in the head and killed by police. On August 4, 2015, a 22 year old man with an air soft gun was shot and killed by Police in a Walmart in Beavercreek, Ohio. On August 6, 2015, a man who entered a movie theater in Tennessee, with an air-soft gun, was killed by police. Accordingly, while the Regional Director correctly noted in his Decision that air-soft guns are "designed to be non-lethal", he failed to adequately consider that they are often mistaken for actual guns and can lead to very lethal consequences.

Since employees actually saw Mr. Quarles display the gun and oil needles, it is very likely employees believed Mr. Quarles was capable of carrying out the threats if they did not support the Union. In fact, the Employee who Mr. Quarles threatened to report for employee theft and misconduct refused to provide a statement to the Employer, said he was "fearful of retaliation" if his name was disclosed, threated to quit his job, and then ultimately quit his job during the middle of the hearing. (Tr. 86, 155) Furthermore, the Employee refused to comply with the subpoena ad testificandum (likely out of intimidation and fear for his safety). Thus, it is clear the threats and other objectionable conduct created a "general atmosphere of fear and reprisal" and were significant enough to require the election be overturned, even based on the third party conduct standard. Accordingly, the Hearing Officer's finding that the Employer offered no competent evidence that Mr. Quarles threated unit employees with a gun and to expose misconduct if unit employees did not for the Union was clearly erroneous, contrary to officially reported Board precedent and resulted in prejudicial error. (HOD 10, ¶ 3)

3. The Election Should be Set Aside Based Upon Jared Quarles Serving As The Union's Election Observer

The Board will find a union's use of a former employee or nonemployee as an observer to be objectionable conduct if there is evidence of misconduct by the observer "**or of prejudice to another party by the choice of that observer**." *Embassy Suites Hotel, Inc.*, 313 NLRB 302 (1993) (Emphasis added); Board Representation Casehandling Manual Section 11310.2. The proper test is an objective one – i.e., whether Mr. Quarles's presence had "the tendency to interfere with employee's freedom of choice." *Cambridge Tool & Mfg. Co.* Thus, under the Board's test, the issue is not whether Mr. Quarles's presence in fact coerced employees, but whether his conduct reasonably tended to interfere with the employees' free and uncoerced choice in the election. *Baja's Place*, 268 NLRB 868 (1984).

Here, Mr. Quarles's presence[16] as one of the Union's election observers most certainly had the tendency to intimidate and coerce voting employees into voting for the Union. Again, it

[16] There were no charges filed with the NLRB alleging Mr. Quarles was unlawfully terminated.

is undisputed that Mr. Quarles brought a gun to the workplace, showed it to at least three voting unit employees, waived the gun in the employee break room, and told voting unit employees "I got this in case fuckers want to get crazy." (Tr. 85, 111, 115, 154, 160-161) Contrary to the Regional Director's decision (RDD 6, fn. 7), by the time of the election, the entire voting unit at Market Street and at least four to five voting unit employees at Pine Street heard that Mr. Quarles was terminated for having a "gun" at work and physically escorted off the property by the police. (Tr. 63, 118-120, 213-214, 229, 236-239, 280) There is no absolutely evidence in the record that any voting unit employee learned that the gun turned out to be an air soft gun prior to the election. Accordingly, while the Regional Director may have concluded that the asserted offense fell short of its initial appearance, this did not lessen the coercive impact it had on voting unit employees. Rather, Mr. Quarles's presence as one of the Union's election observers created a psychology of intimidation, gave an unfair advantage to the Union, destroyed the freedom of choice, and established an atmosphere in which a free election could not be held. Voting unit employees who showed up to vote at Pine Street would have been reasonably concerned by Mr. Quarles presence in the voting room, questioned the impartiality of the election process, and would have been unnerved to have to state their names to Mr. Quarles, and thus, may have voted for the Union out of fear. In addition, aside from the observers present at the pre-election conference, at least three to four voting unit employees at Market Street observed and/or heard Mr. Quarles was with the Union at the pre-election conference. (Tr. 214-215, 229) Thus, employees who showed up to vote at Market Street would have also been intimidated on the day of the election.

Nevertheless, notwithstanding the above, the Regional Director concluded that employees would not have considered Mr. Quarles's "offense" to be serious by the mere fact that Mr. Quarles was not in handcuffs when escorted off the property by police and because he ultimately served as an election observer. This conclusion is entirely speculative and unsupported by the record evidence. The fact that Mr. Quarles was in hand cuffs does not negate the fact that Mr. Quarles was physically escorted out of the building by the police and that

employees thought it was for having an actual gun at work. Furthermore, contrary to the Regional Director's suggestion, the Employer never condoned the Union's use of Mr. Quarles as an election observer. Rather, it is undisputed that the Employer's attorney challenged Mr. Quarles's participation as an observer during the pre-election conference. (RDD 6, fn. 7; Tr. 63-64) Further, while the Regional Director appears to fault the Employer for not broadcasting its challenge of Mr. Quarles to the entire voting group, had it done so, this would be have likely been deemed objectionable conduct.

Finally, while the Union claims it did not learn of Mr. Quarles's termination until the morning of the election, it is undisputed that the Union's President Olga Miranda found out that Mr. Quarles had been suspended for having a "gun" on premises at least *two* days prior to the election. (Tr. 64) Accordingly, two days was more than ample time for the Union to arrange for alternative observer arrangements. In any event, nothing in the case cited in the Regional Director's Decision remotely suggest that short notice to the Union of the observer's misconduct somehow excuses the Union's objectionable conduct.

Based upon the foregoing, the Employer sustained its burden on Objection 2. Thus, the Regional Director's failure to set aside the election and direct a new election based on Objection 2 was clearly erroneous, contrary to officially reported Board precedent and resulted in prejudicial error.

V. THE ELECTION SHOULD BE SET ASIDE BASED UPON THE UNION'S CONDUCT OF ELECTIONEERING AND VIOLATING THE BOARD'S CAMPAIGN RULES AND CREATING THE IMPRESSION OF SURVEILLANCE (OBJECTION #3 AND #5)

The Employer's Objection #3 states:

> The Union, through its officers, employees, agents, authorized representatives and others acting on its behalf and/or with its apparent authority, actual or implied endorsement or ratification, threatened, intimidated, harassed and coerced voting unit employees by having its observers use cell phones in the voting room, engage in electioneering, make comments to and in the presence of voting unit employees during the election regarding how

> they should or would vote, and engage in and/or create the impression of surveillance of voters (and potential voters). Such conduct had a coercive impact on eligible voters, destroyed the laboratory conditions required in Board elections and improperly affected the results of the election.

A. Evidence Relevant to and Applicable Board Law Supporting Objection 3

1. Union Observers Maintained a List of Voters on Election Day Thereby Creating the Impression of Surveillance

Mr. Quarles served as the as the Union's observer at Pine Street and was supposed to switch with Mr. Eneliko half way through the polling period (i.e., 2 PM). (Tr. 404-406, 421) Ms. Miranda admitted exchanging a number of text messages with Mr. Eneliko while the polls were open at Pine Street. At approximately 1:09 PM, Ms. Miranda sent Mr. Eneliko a text message stating, "Soga any word on Tammy or Brittany?" Mr. Eneliko responded and Ms. Miranda replied, "please insist." (Tr. 418; E. Exh. p. 5) Thereafter, at approximately 1:48 PM, Ms. Miranda texted Mr. Eneliko stating, "what's the status of Tammy". Soga replied, "she is with her Mom right now." (Tr. 415; E. Exh. p. 5) Ms. Miranda testified that Tammy and Brittany were employees at Equinox. (Tr. 404) At approximately 1:48 PM (immediately prior to Mr. Eneliko relieving Mr. Quarles), Ms. Miranda sent Mr. Eneliko a text message stating: "HIGHLIGHT ONLY THE NAMES OF PEOPLE THAT VOTED." (Tr. 419; E. Exh. p. 5) Mr. Eneliko responded, "I did", indicating that he highlighted the names of the purported Union "supporters" who came in to vote at Pine Street. (Tr. 419-420; E. Exh. p. 5) Ms. Miranda testified that she advised **all** of the Union observers to highlight the names of employees who voted and to communicate with her when they voted. (Tr. 412)

The hearing was held on July 13, 14, and 15. Prior to the presentation of evidence, the Hearing Officer ruled on the Petition to Revoke and ordered the Union to produce certain documents responsive to the Subpoena by close of business on July 13, or at the latest by the morning of July 14. During the evening of July 13, the Union produced some documents responsive to Subpoena, including text messages exchanged between the Union and its purported agents. During the morning of July 14, Counsel for the Employer asked counsel for the Union to

confirm that the Union had produced "all documents" responsive to the Subpoena that were in the Union's possession, custody and control. The Union confirmed it had produced all documents responsive to the Subpoena. Notwithstanding counsel for the Union's representation, during the evening of July 14, the Union produced additional documents responsive to the Subpoena, including certain e-mail communications between Union and its purported agents. By July 15, the third day of the hearing, it became clear that the Union had not fully complied with the Subpoena and had not produced a number of documents responsive to the Subpoena, including text messages exchanged between the Union and other purported agents, as well as payroll documents establishing that Rosario Rodriguez was an employee organizer of the Union during the critical period, including when Ms. Rodriguez served as one of the Union's observers. Thus, the Employer was not aware of Ms. Miranda and Mr. Eneliko's conduct until late in the proceedings, when the Union produced certain documents responsive to the Employer's Subpoena Duces Tecum including text messages between Mrs. Miranda and the Union's purported agents. The Union's conduct in directing the Union's observers to highlight the names of employees who had voted violated the Board's well established rules prohibiting maintaining any kind of list of voters.

a. The Hearing Officer erred in finding that Eneliko was not acting as the election observer at the time he was alleged keeping the list and had no conspicuous presence at the polls

The Hearing Officer concluded that Eneliko was not acting as an election observer at the time he "was allegedly keeping the list". (HOD 14, ¶10) The Hearing Officer further concluded Mr. Eneliko had no conspicuous presence at the polls, and no evidence that voters would have crossed his path. Further, the Hearing Officer found there was no evidence that any voter herein was aware of Eneliko's presence. There is no evidence to support these findings. The Hearing Officer correctly noted that the reason why there was no such testimony may be because the Employer did not discover this conduct until after the second of three days of hearing. The Hearing Officer correctly concluded that although the Employer's subpoena duces tecum had

requested documents and communications be produced at the commencement of the hearing, the Union did not produce them until after the second day. The Hearing Officer concluded that "perhaps the equitable course of action would be to re-open the hearing and allow the Employer to subpoena Eneliko and/or produce other witnesses who could testify to what Eneliko was doing during the first two hours of the polling at Pine Street." However, the hearing Officer noted that he did not have that authority. (HOD 14, fn. 14) The Regional Director does have such authority but declined to reopen the record. In his Decision, the Regional Director concluded, it was "unnecessary to reopen the record, and I accordingly deny the Employer's request to reopen it. Among other purposes, the Employer requests to reopen the record in order to belatedly subpoena and examine employee Eneliko about his observation and potential list keeping of voters (while not serving as the Petitioner's observer) at an unknown distance from the polls. In the absence of any evidence whatsoever that employees were aware of Eneliko's conduct, whatever it was, it is not objectionable. See *Chrill Care, Inc.*, 340 NLRB 1016, 1016 (2003) ("the Board generally does not find list making coercive in the absence of evidence that employees knew their names were being recorded")". (RDD 5, fn. 6). The Regional Director's reliance on *Chrill Care*, is misplaced, where in that case, the only witnesses who testified that they witnessed union organizers recording anything were non-unit employees. *Id.* 1017. In the instant case, the Union's delay in producing subpoenaed documents should not inure to the Union's benefit. The evidence at the Hearing established Mr. Eneliko was "highlighting", thus recording names of voters, in violation of well-established Board precedent. Ms. Miranda testified she instructed all observers to do the same.

As noted in the Employer's Brief on Objections, in *Piggly-Wiggly*, 168 NLRB 792 (1967), the Board stated "it has been the policy of the Board to prohibit anyone from keeping any list of persons who have voted, aside from the official eligibility list used to checkoff voters as they receive ballots." *Piggly-Wiggly*, 168 NLRB 792, 793; *see also Textile Service Indus.*, 284 NLRB 1108, 1109 (1987); *Medical Center of Beaver County, Inc. v. N.L.R.B.,* 716 F.2d at 999 (7th Cir.1983). Federal courts have generally recognized that "in the interests of ensuring free,

non-coerced elections, the Board has set aside elections 'if employee voters know, or reasonably can infer, that their names are being recorded' on unauthorized lists." *Days Inn Management Co. v. NLRB*, 930 F.2d 211, 215 (2nd Cir. 1991) (citation omitted); *see also NLRB v. WFMT, Div. of Chicago Educ. Television As'n*, 997 F.2d 269 (7th Cir. 1993). In *Piggly-Wiggly*, the Regional Director concluded that, "the Petitioner's activity at each of the stores where it admittedly, '…checked off employees' names as they entered the store for the purpose of determining which employees had voted' constituted a material and substantial departure from permissible election activity." *Id.*

The Board's longstanding policy of prohibiting the keeping any list, apart from the official voting list, of persons who have voted in a Board election, was initially set forth in *International Stamping, Inc.*, 97 NLRB 921 (1951) and *Belk's Department Store of Savannah*, 98 NLRB 280 (1952). The Board is particularly protective of the voting process and has long maintained this policy. Thus, the Board will set aside an election where it can be affirmatively shown or could be inferred from the circumstances, that the employees knew that their names were being recorded. Given that Ms. Miranda directed **all** of the Union observers to highlight the names of those employees who voted at the three polling locations, it is eminently reasonable to infer that the employees knew that their names were being recorded. The instant case is distinguishable from *Days Inn Management Co. v. NLRB*, where the Court found that "although [the Company observer] crossed names off a list when individuals arrived at the hotel to vote,", the Company observer "was attempting to ensure that only those individuals with a right to be in the hotel would be permitted to go to the second floor." 930 F.2d 211, 215 (2d Cir. 1991) Based on these specific facts and circumstances, the Court departed from the *Piggly-Wiggly* rule in finding the Company observer did not engage in objectionable conduct. In the instant case, there is no evidence whatsoever that Union's observers were tracking voters for a similar purpose as that in *Days Inn*, and therefore no basis for departing from the *Piggly Wiggly* rule.

Since the Employer was not aware of this conduct, until the second to the last day of hearing, it could not and did not have the opportunity to investigate this allegation, call witnesses and present evidence. The Board's Rules and Regulations, Section 102.65 (e) states:

> (1) A party to a proceeding may, because of extraordinary circumstances, move after the close of the hearing for reopening of the record, or move after the decision or report for reconsideration, for rehearing, or to reopen the record, but no such motion shall stay the time for filing a request for review of a decision or exceptions to a report. No motion for reconsideration, for rehearing, or to reopen the record will be entertained by the Board or by any regional director or hearing officer with respect to any matter which could have been but was not raised pursuant to any other section of these rules, except that the regional director may treat a request for review of a decision or exceptions to a report as a motion for reconsideration. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on for the motion. A motion for rehearing or to reopen the record shall specify briefly the error alleged to require a rehearing or hearing de novo, the prejudice to the movant alleged to result from such error, the additional evidence sought to be adduced, why it was not presented previously, and what result it would require if adduced and credited. Only newly discovered evidence—evidence which has become available only since the close of the hearing—or evidence which the regional director or the Board believes should have been taken at the hearing will be taken at any further hearing.
>
> Any motion for reconsideration or for rehearing pursuant to paragraph (e)(1) of this section shall be filed within 14 days, or such further period as may be allowed, after the service of the decision or report. Any request for an extension of time to file such a motion shall be served promptly on the other parties. A motion to reopen the record shall be filed promptly on discovery of the evidence sought to be adduced.

Here, the newly discovered evidence adduced during the hearing that Mr. Eneliko was monitoring voters and texting Ms. Miranda about those voters he communicated with or observed voting. This coupled with Ms. Miranda's testimony that she advised all of the Union observers to highlight the names of employees who voted and to communicate with her when they voted. (Tr. 412) This evidence is critical and has the high probability to have been conduct which violated of the Board's longstanding precedent. There is sufficient evidence to establish Mr. Eneliko and the other Union observers engaged in objectionable conduct in maintaining a list of voters. Alternatively, the Employer moves for a rehearing on this issue to provide witness

testimony from employees and/or Employer representatives regarding the location of Mr. Eneliko during the polling period at Pine Street as well as evidence regarding his communications with voters during this time. Moreover, given Ms. Miranda's testimony, that she advised all of the Union observers to do the same, the Employer requests a re-hearing to present the activities of observers at the other locations as well. There is no question that this evidence is critical in determining whether the Union engaged in conduct which violated the NLRB's rules and regulations and such evidence could impact the decision regarding the validity of the election. The evidence came to light during the second day of hearing despite the Employer's Subpoena Duces Tecum but the evidence was not produced until the second day of hearing. The Employer believes based upon the Union's reluctance to disclose all responsive documents to the Subpoena Duces Tecum, it is not unreasonable to believe there exists additional evidence on this issue. As the Hearing Officer noted in his Report, this is the equitable course of action. Accordingly, in the absence of a finding the Union observers engaged in objectionable conduct, the Employer requests that the hearing be reopened for the purpose of introducing this evidence.

2. The Union's Designation of Paid Employee as an Observer

Ms. Rodriguez served as the Union's observer the Union Street location.[17] As an initial matter, we note the Employer was not aware that Ms. Rodriguez was a paid Union organizer at the time of the election. This fact was only discovered at the Hearing when the Employer subpoenaed, inter alia, documents which would establish the agency status of certain individuals including Ms. Rodriguez. Notwithstanding that the Petitioner was directed by the Hearing Officer to produce certain documents responsive to the Subpoena, the Petitioner did not fully comply with the Subpoena as directed by the Hearing Officer, and did not produce a number of documents responsive to the Subpoena, including text messages exchanged between the Union and other purported agents, as well as payroll documents establishing that Ms. Rodriguez was an employee organizer of the Petitioner during the critical period. However, text messages between

[17] At the time of the election, there were no charges filed with the NLRB alleging Ms. Rodriguez's termination was unlawful.

Ms. Rodriguez and Ms. Miranda as well as their respective testimony disclosed Ms. Rodriguez was hired by the Union on or about June 1, 2015.

The Board's Representation Casehandling Manual addresses who may serve as election observers. Specifically, Section 11310.2 states:

> Observers should be employees of the employer, unless a party's use of an observer who is not a current employee of the employer is reasonable under the circumstances. *Embassy Suites Hotel*, 313 NLRB 302 (1993); *Kelly & Hueber*, 309 NLRB 578 (1992). A supervisor should not serve as an observer. *Bosart Co.*, 314 NLRB 245 (1994). An alleged discriminate is eligible to serve as an observer. A union official should not serve as an observer unless he/she is also an employee of the employer.

In *Embassy Suites Hotel, Inc.*, 313 NLRB 302 (1993), the Board noted that Section 11310 of the Casehandling Manual is "aimed primarily at preventing intimidation that might take place should the employer choose to have supervisory employees present." By describing this as the primary purpose of the rule, the Board necessarily concedes that there are secondary purposes, one of which is undoubtedly aimed at intimidation that might take place should the union designate a former employee or nonemployee as an observer. Thus, the Board will find the union's use of a former employee or nonemployee as an observer to be objectionable conduct if there is evidence of misconduct by the observer or of prejudice to another party by the choice of that observer. *Id.*; *see generally San Francisco Bakery Employers Assn.*, 121 NLRB 1204, 1206 (1958).

Here, the evidence produced as a result of the Employer's Subpoena established that voting unit employees were aware that Ms. Rodriguez was employed by the Union. The evidence also establishes her misconduct during the critical period. Accordingly, Ms. Rodriguez' presence as one of the Union's election observers, had the reasonable effect of intimidating and coercing voting employees into voting for the Union. Ms. Rodriquez' presence as an observer at the election had a coercive effect on the voters and prejudiced the Employer.

This fact was only discovered at the Hearing when the Employer subpoenaed documents which established the agency status of various former employees, including Ms. Rodriguez. The

Regional Director properly concluded that Ms. Rodriguez was acting as an agent of the Union while on its payroll. (RDD 4) However, the Regional Director simply adopted the Hearing Officer's findings regarding Ms. Rodriguez serving as an observer during the election without any further explanation. In light of the proven misconduct of Ms. Rodriquez, as well as the fact that she was a paid Union employee, her presence as a Union observer had the effect of intimidating and coercing voting employees into voting for the Union, by any standard, including the standard of reasonableness.

a. The Hearing Officer erred in finding that the Union's use of Ms. Rodriguez as an observer was not objectionable

The evidence established that Ms. Rodriquez served as the Union's Observer at Pine Street. The Hearing Officer's Report erroneously concluded that there was "no evidence that anyone at Union Street knew she was an employee of the Union at the time." Further, the hearing was devoid of any discussion of the Union Street facility and no objectionable conduct was alleged to have occurred at the Union Street facility. These findings are significantly flawed and assume that the Employer had knowledge that Ms. Rodriguez was a paid union employee. The Employer had no knowledge that Ms. Rodriguez was a paid employee.

The Hearing Officer concluded that the Employer's Objection 5, insofar as it includes the issue of Rodriguez as an observer, be overruled for the following reasons:

> "(1) The Employer did not specifically raise this issue in its Objections, thereby depriving the Union of any notice that is would be an issue; (2) Rodriguez, while technically 'on the Union's payroll' at least temporarily, was hardly a 'union official' as that term is commonly understood but served as an organizer at the Employer's facilities for a period of nineteen days subject to the director of Olga Miranda; (3) no evidence was introduced that any unit employee, especially the employees employed at Union Street, had any knowledge that Rodriguez was a temporary employee of the Union; (4) no evidence was offered that Rodriguez used her capacity as a temporary Union employee to threaten or coerce Union Street employees in any way or otherwise acted in an improper fashion while serving as the Union's observer." (HOD 17, ¶ 3)

The Hearing Officer's conclusions are seriously flawed and prejudicial for the following reasons: (1) The Employer did not learn of Rodriguez' status as a paid employee until the second

day of hearing as a result of documents produced in response to its subpoena; (2) the Hearing Officer's finding that she was a "temporary" employee and hardly a "union official" is erroneous and not consistent with Board precedent; (3) the Employer was not given an opportunity to present evidence regarding whether unit employees, especially the employees employed at Union Street, had any knowledge that Rodriguez was a temporary employee of the Union, because this was newly discovered evidence; and (4) there was ample evidence presented regarding Ms. Rodriguez' misconduct but, once again the Employer was unaware that Ms. Rodriguez was employed by the Union. The fact that there is ample evidence of Ms. Rodriguez' misconduct coupled with the newly discovered evidence that she was a paid organizer requires the Regional Director reverse the Hearing Officer's conclusion to overrule the Employer's Objection.

As set forth in Section IV A herein, in the absence of reversing the Hearing Officer's findings, the only equitable recourse is to re-open the Hearing to allow the Employer an opportunity to present evidence regarding this critical issue. For the Regional Director to find otherwise will disenfranchise the Employer's position and most importantly, it will disenfranchise the unit employees.

VI. CONCLUSION

For all the reasons stated herein, the Employer respectfully requests that the Board review and overturn the Regional Director's Decision.

Respectfully submitted this 24th day of November, 2015.

By 

LINDA R. CARLOZZI
KEAHN N. MORRIS

JACKSON LEWIS P.C.
EQUINOX HOLDINGS, INC.

EXHIBIT A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

EQUINOX HOLDINGS, INC.

Employer

And **Case 20-RC-153017**

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 87

Petitioner

DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to a Stipulated Election Agreement, an election was conducted on June 19, 2015 in the following appropriate voting unit:

> All full-time and regular part-time maintenance associates, maintenance MODs, and building ops associates (mechanics) employed by the Employer at its facilities located at 747 Market Street, 301 Pine Street, and 2055 Union Street, San Francisco, California; excluding all other employees, managers, guards, and supervisors as defined in the Act.

The *Tally of Ballots* showed that 41 ballots were cast for the Petitioner and 33 ballots were cast against representation, with one non-determinative challenged ballot. The Petitioner thus received a majority of the valid votes cast.

Pursuant to Board Rule 102.69(c), the Employer filed timely Objections to Conduct of the Election. Following three consecutive days of hearing, on September 18, 2015, the hearing officer issued his Report on Objections, in which he recommended overruling the Objections in their entirety. The Employer filed timely exceptions to the hearing officer's recommendations. The Petitioner filed a reply brief to the Employer's exceptions.

The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. I have duly considered the evidence and the arguments presented by the parties and, as summarized below, I agree with the hearing officer that

all of the Employer's objections should be overruled. Accordingly, I am issuing a Certification of Representative.

I. THE OBJECTIONS

As set forth in the Hearing Officer's Report, the hearing officer considered the Employer's Objections 1 through 5. These objections allege:

1. During the critical period preceding the Election and/or during the Election, the Union, through its officers, employees, agents, authorized representatives and others acting on its behalf and/or with its apparent authority, actual or implied endorsement or ratification, threatened, intimidated, harassed and coerced voting unit employees by telling voting unit employees that they would call INS and they would lose their job if they did not vote "Yes" or for the Union in the Election. Such conduct had a coercive impact on eligible voters, destroyed the laboratory conditions required in Board elections and improperly affected the results of the election.

2. During the critical period preceding the Election and/or during the Election, the Union, through its officers, employees, agents, authorized representatives and others acting on its behalf and/or with its apparent authority, actual or implied endorsement or ratification, threatened, intimidated, harassed, coerced and extorted voting unit employees by having an employee show voting unit employees a firearm, telling voting unit employees the firearm was for anyone who "fucked with him", and telling employees he would report allegations of employee theft and misconduct to the Employer if they did not vote "Yes" or for the Union in the Election. Following the above conduct, the same employee served as the Union's election observer in order to intimidate and coerce employees into voting "Yes" or for the Union in the Election. Such conduct had a coercive impact on eligible voters, destroyed the laboratory conditions required in Board elections and improperly affected the results of the election.

3. The Union, through its officers, employees, agents, authorized representatives and others acting on its behalf and/or with its apparent authority, actual or implied endorsement or ratification, threatened, intimidated, harassed and coerced voting unit employees by having its observers use cell phones in the voting room, engage in electioneering, make comments to and in the presence of voting unit employees during the election regarding how they should or would vote, and engage in and/or create the impression of surveillance of voters (and potential voters). Such conduct had a coercive impact on eligible voters, destroyed the laboratory conditions required in Board elections and improperly affected the results of the election.

4. The Board, through its Agent(s) overseeing the election, interfered with the election and/or failed to provide the minimum laboratory conditions necessary for a free

and fair election by allowing the Union's observers to use cell phones in the voting room, engage in electioneering, make comments to and in the presence of voting unit employees during the election regarding how they should or would vote, and engage in and/or create the impression of surveillance of voters (and potential voters).

5. By the conduct described above and other conduct, the Petitioner, through its officers, employees, agents, authorized representatives and others acting on its behalf and/or with its apparent authority, actual or implied endorsement or ratification, has interfered with and coerced eligible voters with regard to the exercise of their section 7 rights under the National Labor Relations Act and destroyed the atmosphere necessary to conduct a fair election through the Board's standards. Alternatively, the above conduct by employees who supported the Union destroyed the atmosphere necessary to conduct a fair election under the third party standard. The above coercive acts and other conduct taking place during the critical pre-election and actual voting period were sufficient to unlawfully affect the results of the election.

II. THE HEARING OFFICER'S FINDINGS and THE EMPLOYER'S EXCEPTIONS:

The hearing officer concluded that the Employer failed to sustain its burden to prove that the Petitioner[1] and/or third parties engaged in any objectionable conduct that would warrant setting aside the election, and recommended that the Objections be overruled in their entirety. I agree.[2]

The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces it that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). Although that standard was adopted in the context of direct Board review of a hearing officer's findings, I believe that it applies with equal force to my review, under Rule 102.69(c), which became effective April 14, 2015, and is applicable to this case. Based upon my review, the Employer has established no basis for reversing the hearing officer's findings.

[1] I shall use Union and Petitioner interchangeably when referring to Service Employees International Union, Local 87.

[2] I adopt the Hearing Officer's Report and Recommendations, for the reasons he cites, for those Objections and issues not specifically discussed in this Decision.

The Employer's exceptions to the Hearing Officer's Report are based in large part on his finding that only one of the employees who campaigned for the Petitioner (Ms. Rodriguez) was acting as its agent as defined by Section 2(13) of the Act. That finding correctly led him to analyze the alleged conduct of employees other than Rodriguez under the Board's nonparty (or third-party) standard and, based thereon, to find that none of it warrants setting aside the election. To the extent that Rodriguez was acting as an agent of Petitioner while on its payroll, I do not rely on the hearing officer's conclusion that the alleged threat attributed to her in Objection 1 became moot upon Petitioner's victory. Rather, because the hearing officer reasonably discredited witness Garay's testimony on this point, the evidence does not support that allegation.[3]

Additionally, with respect to Objections 2 and 5, the Employer excepts to the hearing officer's decision not to seek enforcement of the Employer's subpoena *ad testificandum* of one unnamed witness or to postpone the hearing to allow the Employer itself to seek enforcement of its subpoena. The Employer asserts that an unnamed employee witness would testify that, during the critical period, employee Quarles threatened to report that employee's misconduct to the Employer if he did not vote for the Union. The Employer further contends that that witness was one of three employees who observed Quarles's brandishing of an "airsoft gun[4]" and Quarles's proclamation that he possessed it in case "any fuckers want to get crazy." The Employer did not subpoena the unnamed employee witness until the second or third day of hearing, and

[3] As discussed above, I see no basis for reversing his finding. The Employer contends that the hearing officer improperly discredited witness Garay by, among other things, failing to consider whether Garay understood the questions translated to him in Spanish. The Employer's contention is based primarily on Garay's stated inability to understand one question during the hearing and the interpreter's requests to have questions repeated on a few occasions. However, neither of those events is uncommon at hearing, and the record does not demonstrate that the witness did not understand the questions ultimately posed to him. Once those questions were repeated and/or clarified, Garay responded without any apparent, or further professed, difficulty in understanding.

[4] Although not elaborated upon in the hearing officer's decision, I take notice that "airsoft" guns are "replica firearms, or a special type of air guns used in airsoft [a combat-type game], that fire spherical projectiles of many different materials, including (but not limited to) plastic, aluminum, and biodegradable material." https://en.wikipedia.org/wiki/Airsoft_gun. They are designed to be non-lethal and to imitate the appearance of a firearm. The hearsay testimony, which the hearing officer admitted despite objection and which I shall accept at face value for the purposes of this Decision, establishes that one of the three unnamed employees seemingly mistook Quarles's imitation gun for an actual firearm.

did so only after the hearing officer correctly pointed out that the Employer's proffered testimony regarding the incident was hearsay and of little probative value.

I further agree with the hearing officer's decision, in connection with Objections 2 and 5, not to delay the hearing in order to seek, or permit the Employer to seek, enforcement of the subpoena. Even assuming that Quarles threatened in one instance to report the unnamed employee's misconduct to the Employer, that threat was directed to, and involved, only the unnamed employee—an insufficient number to affect the election results. As the hearing officer found, Quarles's separate alleged brandishing of an imitation gun and his ambiguous proclamation cannot reasonably be linked to the election, particularly as far as the other two unnamed employee witnesses are concerned.[5] The two events are wholly unrelated. It follows that this conduct would not have the tendency to interfere with employee free choice in the election. Accordingly, notwithstanding the Employer's contentions, adjourning the hearing for the time necessary to obtain enforcement of the subpoena, and possibly further proceedings to compel the anonymous witness's testimony, would not necessarily have resolved any relevant issue.[6] In sum, any error in failing to seek enforcement of the subpoena was at most harmless.

Turning to Quarles's service as the Petitioner's observer (Objection 5), I agree with the hearing officer that it was not objectionable. While a handful of employees observed police officers handcuff Quarles and escort him to a private office four days before the election, those same employees and/or others also observed Quarles subsequently exit the Employer's facility accompanied by the police, uncuffed and

[5] The Employer did not subpoena those employee witnesses, although it appears from Area Maintenance Manager Fernandez's testimony that he knew the witnesses' identities. Nevertheless, as noted, I accept the finding that Quarles brandished an imitation gun.

[6] I also find it unnecessary to reopen the record, and I accordingly deny the Employer's request to reopen it. Among other purposes, the Employer requests to reopen the record in order to belatedly subpoena and examine employee Eneliko about his observation and potential list keeping of voters (while not serving as the Petitioner's observer) at an unknown distance from the polls. In the absence of any evidence whatsoever that employees were aware of Eneliko's conduct, whatever it was, it is not objectionable. See *Chrill Care, Inc.*, 340 NLRB 1016, 1016 (2003) ("the Board generally does not find list making coercive in the absence of evidence that employees knew their names were being recorded").

otherwise unrestrained. Quarles's service as an election observer a mere four days later further demonstrated to employees that his "offense" was not considered serious. Moreover, there is no record evidence that any voters had any reason to believe that the Employer objected to Quarles's service as Petitioner's observer.[7] By all appearances, Quarles belonged and was welcome there. Finally, the record establishes that Petitioner did not even learn of the Employer's eleventh-hour termination of Quarles until the morning of the election. In these circumstances, when notice was short, the election was imminent, and when the asserted "offense" fell far short of its initial appearance, it was not unreasonable or objectionable for the Petitioner to utilize Quarles as its observer. See, generally, *Embassy Suites Hotel, Inc.*, 313 NLRB 302 (1993); citing *San Francisco Bakery Employers Assn.*, 121 NLRB 1204, 1206 (1958); and *Kelley & Hueber*, 309 NLRB 578 (1992).

Finally, with respect to the Union's "rally" on the morning of the election (Objection 3), I agree with the hearing officer's finding that it did not contravene the Board's *Peerless Plywood* rule. It also bears noting that neither would the rally reasonably convey to employees that the Employer was "powerless to protect its own legal rights" in a confrontation with the Petitioner. Compare *Phillips Chrysler Plymouth*, 304 NLRB 16 (1991). In sum, the "rally" did not constitute objectionable conduct.

III. CONCLUSION

While this was a close election, the margin of victory is not the predominant consideration. See e.g., *Mastec North America, d/b/a Mastec Direct TV*, 356 NLRB No. 110 (2011)(the union won by a 14 to 12 margin); *The Lamar Company, LLC d/b/a*

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[7] There is no evidence that employees knew of Quarles's termination prior to the election. Union Representative Miranda testified that the Employer's attorney "challenged his participation" in the election during the pre-election conference at the Market Street polling location, but there is no evidence that this "challenge" was raised in the presence of any voters at all, much less any who voted at the Pine Street location, where Quarles served as an observer. During the Union's "rally" at the pre-election conference, the Employer's employee observers were seated against a wall at a distance approximated on the record to be 20-30 feet from where the Employer's attorney and Quarles stood. It's unclear whether they were still seated at that distance, or even in the room, when the attorney raised his challenge.

Lamar Advertising of Janesville, 340 NLRB 979 (2003)(the union prevailed by a 9 to 7 margin). Rather, the paramount consideration is whether the alleged objectionable conduct can reasonably be said to have affected the outcome of the election. Having carefully reviewed the entire record, the Hearing Officer's Report and recommendations, the Employer's exceptions, and the arguments made by the parties, I believe the hearing officer correctly found the answer to be in the negative. Accordingly, pursuant to Rule 102.69(c)(2), I overrule the Objections in their entirety, and I shall certify the Petitioner as the exclusive collective-bargaining representative of the appropriate bargaining unit, below.

IV. CERTIFICATION OF REPRESENTATIVE

IT IS HEREBY CERTIFIED that a majority of the valid ballots have been cast for **SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 87**, and that it is the exclusive representative of all the employees in the following bargaining unit:

> All full-time and regular part-time maintenance associates, maintenance MODs, and building ops associates (mechanics) employed by the Employer at its facilities located at 747 Market Street, 301 Pine Street, and 2055 Union Street, San Francisco, California; excluding all other employees, managers, guards, and supervisors as defined in the Act

V. REQUEST FOR REVIEW

Pursuant to Section 102.69(c)(2) of the Board's Rules and Regulations, any party may file with the Board in Washington, DC, a request for review of this decision. The request for review must conform to the requirements of Sections 102.67(e) and (i)(1) of the Board's Rules and must be received by the Board in Washington by **November 24, 2015**. If no request for review is filed, the decision is final and shall have the same effect as if issued by the Board.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the Request for Review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated at San Francisco, California this 10th day of November, 2015.

/S/

Joseph F. Frankl, Regional Director
National Labor Relations Board,
Region 20
901 Market Street, Suite 400
San Francisco, California 94103

EXHIBIT B

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

EQUINOX, Employer, and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 87 Petitioner	Case 20-RC- 153017

EMPLOYER'S OBJECTIONS TO THE CONDUCT OF THE ELECTION AND TO CONDUCT AFFECTING THE RESULTS OF THE ELECTION

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Pursuant to Section 102.69 of the National Labor Relations Board's ("NLRB" or "Board") Rules and Regulations, Equinox Holdings, Inc. (the "Company" or "Employer"), by and through its undersigned counsel, hereby objects to the Election and to conduct affecting the results of the Election held on June 19, 2015, pursuant to the representation petition filed by the Service Employees International Union, Local 87 ("Petitioner" or "Union"), in the above-referenced case, for the following reasons:

1. During the critical period preceding the Election and/or during the Election, the Union, through its officers, employees, agents, authorized representatives and others acting on its behalf and/or with its apparent authority, actual or implied endorsement or ratification, threatened, intimidated, harassed and coerced voting unit employees by telling voting unit employees that they would call INS and they would lose their job if they did not vote "Yes" or for the Union in the Election. Such conduct had a coercive impact on eligible voters, destroyed the laboratory conditions required in Board elections and improperly affected the results of the election.

2. During the critical period preceding the Election and/or during the Election, the Union, through its officers, employees, agents, authorized representatives and others acting on its behalf and/or with its apparent authority, actual or implied endorsement or ratification, threatened, intimidated, harassed coerced and extorted voting unit employees by having an employee show voting unit employees a firearm, telling voting unit employees the firearm was for anyone who "fucked with him", and telling employees he would report allegations of employee theft and misconduct to the Employer if they did not vote "Yes" or for the Union in the Election. Following the above conduct, the same employee served as the Union's election observer in order to intimidate and coerce employees into voting

"Yes" or for the Union in the Election. Such conduct had a coercive impact on eligible voters, destroyed the laboratory conditions required in Board elections and improperly affected the results of the election.

3. The Union, through its officers, employees, agents, authorized representatives and others acting on its behalf and/or with its apparent authority, actual or implied endorsement or ratification, threatened, intimidated, harassed and coerced voting unit employees by having its observers use cell phones in the voting room, engage in electioneering, make comments to and in the presence of voting unit employees during the election regarding how they should or would vote, and engage in and/or create the impression of surveillance of voters (and potential voters). Such conduct had a coercive impact on eligible voters, destroyed the laboratory conditions required in Board elections and improperly affected the results of the election.

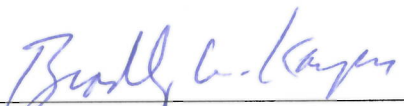
4. The Board, through its Agent(s) overseeing the election, interfered with the election and/or failed to provide the minimum laboratory conditions necessary for a free and fair election by allowing the Union's observers to use cell phones in the voting room, engage in electioneering, make comments to and in the presence of voting unit employees during the election regarding how they should or would vote, and engage in and/or create the impression of surveillance of voters (and potential voters).

5. By the conduct described above and other conduct, the Petitioner, through its officers, employees, agents, authorized representatives and others acting on its behalf and/or with its apparent authority, actual or implied endorsement or ratification, has interfered with and coerced eligible voters with regard to the exercise of their section 7 rights under the National Labor Relations Act and destroyed the atmosphere necessary to conduct a fair

election through the Board's standards. Alternatively, the above conduct by employees who supported the Union destroyed the atmosphere necessary to conduct a fair election under the third party standard. The above coercive acts and other conduct taking place during the critical pre-election and actual voting period were sufficient to unlawfully affect the results of the election.

Accordingly, for the foregoing reasons and any other reason required by law, the Employer respectfully requests that the Regional Director review and investigate Petitioner's (and its officers, employees, agents, authorized representatives and others acting on its behalf and/or with its apparent authority, actual or implied endorsement or ratification) misconduct, and set aside the results of the Election, or, in the alternative, issue an order directing that a hearing be held to address the Employer's objections to the Election.

Respectfully submitted this 26th day of June, 2015.

By 

BRADLEY W. KAMPAS
LINDA R. CARLOZZI
KEAHN N. MORRIS

JACKSON LEWIS P.C.
EQUINOX HOLDINGS, INC.

CERTIFICATE OF SERVICE

Case Name: Equinox
Case No.: 20-RC- 153017

I, Lauretta Adams, declare that I am employed with the law firm of Jackson Lewis P.C., whose address is 50 California Street – 9th Floor, San Francisco, CA 94111; I am over the age of eighteen (18) years and am not a party to this action.

On June 26, 2015, I served the attached **EMPLOYER'S OBJECTIONS TO THE CONDUCT OF THE ELECTION AND TO CONDUCT AFFECTING THE RESULTS OF THE ELECTION** in this action as follows:

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Service Employees International Union, Local 87
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Petitioner

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Petitioner Legal Representative

[✓] **BY ELECTRONIC MAIL (EMAIL): I attached a full, virus-free pdf version of the document to electronic correspondence (e-mail) and transmitted the document to the persons at the e-mail addresses above. There was no report of any error or delay in the transmission of the e-mail.**

I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on June 26, 2015, at San Francisco, California.

Lauretta Adams

Name

4853-0301-9301, v. 1

EXHIBIT C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

EQUINOX

Employer

and **Case 20-RC-153017**

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 87

Petitioner

HEARING OFFICER'S REPORT ON OBJECTIONS

On June 19, 2015 agents of Region 20 conducted an election among certain employees of the Employer. A majority of employees casting ballots in the election voted for representation by the Petitioner (Union). However, the Employer contests the results of the election claiming that the Petitioner engaged in objectionable conduct, and therefore asks that the election be set aside and that a new election be held. Specifically, the Employer contends that the Union, by its agents, threatened to call in Immigration Control and Enforcement (ICE) to investigate the Employer's employees if they did not vote for the Union, exhibited a firearm, threatened to report employee misconduct to the Employer, and engaged in coercive behavior on the day of the election.

After conducting the hearing and carefully reviewing the evidence as well as arguments made by the parties, I recommend that the Employer's objections be overruled because the evidence is insufficient to show that the Petitioner engaged in objectionable conduct. More specifically, there was no credible evidence that the Union or its agents threatened or coerced employees with respect to their participation in the Board election.

After recounting the procedural history, I discuss the parties' burdens and the Board standard for setting aside elections. Then I describe the Employer's operation and an overview of relevant facts. Finally, I discuss each objection.

PROCEDURAL HISTORY

The Petitioner filed the petition on May 27, 2015. The parties agreed to the terms of an election and the Region approved their agreement on June 5, 2015. The election was held on June 19, 2015. The employees in the following unit voted on whether they wished to be represented by the Petitioner:

> All full-time and regular part-time maintenance associates, maintenance MODs, and building ops associates (mechanics) employed by the Employer at its facilities located at 747 Market Street, 301 Pine Street, and 2055 Union Street, San Francisco, California; excluding all other employees, managers, guards, and supervisors as defined in the Act.

The ballots were counted and a tally of ballots was provided to the parties. The tally of ballots shows that 41 ballots were cast for the Petitioner, and that 33 ballots were cast against representation. There was one non-determinative challenged ballot. Thus, a majority of the valid ballots were cast in favor of representation by the Petitioner.

Objections were timely filed. The Regional Director for Region 20 ordered that a hearing be conducted to give the parties an opportunity to present evidence regarding the objections. As the hearing officer designated to conduct the hearing and to recommend to the Regional Director whether the Employer's objections are warranted, I heard testimony and received into evidence relevant documents on July 13-15, 2015. The Employer and Petitioner filed timely briefs, which were carefully considered.

THE BURDEN OF PROOF AND THE BOARD'S STANDARD FOR SETTING ASIDE ELECTIONS

It is well settled that "[r]epresentation elections are not lightly set aside. There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *Lockheed Martin Skunk Works,* 331 NLRB 852, 854 (2000), quoting *NLRB v. Hood Furniture Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (internal citation omitted). Therefore, "the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one." *Delta Brands, Inc.*, 344 NLRB 252, 253, (2005), citing *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989). To prevail, the objecting party must establish facts raising a "reasonable doubt as to the fairness and validity of the election." *Patient Care of Pennsylvania*, 360 NLRB No. 76 (2014), citing *Polymers, Inc.*, 174 NLRB 282, 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970). Moreover, to meet its burden the objecting party must show that the conduct in question affected employees in the voting unit. *Avante at Boca Raton*, 323 NLRB 555, 560 (1997) (overruling employer's objection where no evidence that unit employees knew of the alleged coercive incident).

In determining whether to set aside an election, the Board applies an objective test. The test is whether the conduct of a party has "the tendency to interfere with employees' freedom of choice." *Cambridge Tool Pearson Education, Inc.*, 316 NLRB 716 (1995). Thus, under the Board's test the issue is not whether a party's conduct in fact coerced employees, but whether the party's misconduct reasonably tended to interfere with the employees' free and uncoerced choice in the election. *Baja's Place*, 268 NLRB 868 (1984). See also, *Pearson Education, Inc.*, 336 NLRB 979, 983 (2001), citing *Amalgamated Clothing Workers v. NLRB*, 441 F.2d 1027, 1031 (D.C. Cir. 1970). In *Taylor Wharton Harsco Corp.,* 336 NLRB 157, 158 (2001), the Board set forth its considerations in determining whether a party's misconduct has the tendency to interfere with employees' freedom of choice, as follows: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of conduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and, (9) the degree to which the misconduct can be attributed to the party. See, e.g. *Avis Rent-a-Car System,*

280 NLRB 580, 581 (1986); *Cedars-Sinai Medical Center,* 342 NLRB 596, 597 (2009); *Cambridge Tool,* supra at 716; and *Phillips Chrysler Plymouth, Inc.,* 304 NLRB 16 (1991). The Board has held that no one factor is dispositive, but rather, it is a balancing test of all the factors. *Taylor Wharton Harsco Corp.,* supra at 158.

When elections are close, as in this case where a shift on only four votes could have changed the results of the election, the objections must be carefully scrutinized. *Cambridge Tool & Mfg. Co.,* 316 NLRB 716 (1995). The initial inquiry is whether the allegedly objectionable statements were made by agents of either the union or the employer, or whether they were made by a third-party. *First Student, Inc.,* 359 NLRB No. 120, slip op. at 4 (May 9, 2013). The burden of establishing an agency relationship is on the party asserting its existence. *Millard Processing Services,* 304 NLRB 770, 771 (1991).

THE EMPLOYER'S OPERATION

The Employer operates three physical fitness facilities in San Francisco. At the Market Street (Market) facility, there are 44 unit employees employed. At Pine Street (Pine) and Union Street, there are 17 and 15 unit employees employed, respectively. Unit employees are employed in maintenance and janitorial work. The current Maintenance Manager at Market Street is Zoe Castillo, and the Regional Maintenance Manager is Eric Fernandez.

The election was held at a polling place for each facility. At Market, the polls were open from 12 noon to 1:00 p.m. and from 4:45 p.m. to 5.45 p.m. The Union observers were Claudia Mathews and Julio Hernandez. At Pine, the polls were open from 12:45 p.m. to 3:15 p.m. The Union's observers were Jared Quarles until about 2:36 p.m. and Soga Eneliko thereafter. At Union Street, the polls were open from 1:15 p.m. to 2:45 p.m. The Union's observer was Rosario Rodriguez. The Employer's election observers were Esther Paniagua, Edna, Guy, and Tanisha; the record does not reflect their polling locations.

THE EMPLOYER'S OBJECTIONS AND MY RECOMMENDATIONS

The order directing hearing in this matter instructs me to resolve the credibility of witnesses testifying at the hearing and to make findings of fact. Unless otherwise specified, my summary of the record evidence is a composite of the testimony of all witnesses, including in particular testimony by witnesses who are consistent with one another, with documentary evidence, or with undisputed evidence, as well as testimony that is uncontested. Omitted testimony or evidence is either irrelevant or cumulative. Credibility resolutions are based on my observations of the testimony and demeanor of witnesses and are more fully discussed within the context of the objection related to the witnesses' testimony.

The Employer called nine witnesses to testify in support of its position that the Objections should be sustained: John Gannon, Regional Vice-President for the West Coast; Eric Fernandez, Regional Maintenance Manager; Elpidio Garay-Perez, Maintenance Associate at Market; Esther Paniagua, Maintenance Associate at Market; Elvia Contreras, Maintenance Associate at Market; Ana Maria Maraego, Maintenance Associate at Market; Naeli Mendoza,

Maintenance MOD at Pine; Sylvia Estevez, Maintenance Associate at Pine; and Miguel Pineda, Maintenance MOD at Market. The Employer also called Olga Miranda, the Union's President, as an adverse witness. The Union called three witnesses: Claudia Mathews, former Maintenance Associate at Market; Julio Hernandez, Facilities Attendant at Market, and Rosario Rodriguez, former Maintenance Associate at Market and temporary Union employee during June.

Objection 1: The Union, by its agents, threatened, intimidated, harassed and coerced unit employees by threatening to call ICE if they did not vote for the Union.

Record Evidence

Garay-Perez testified that, in a telephone conversation about two weeks before the election, Rosario Rodriguez told him that, if the Union lost the election, she would take it upon herself to bring in ICE.[1] Garay did not testify that Rodriguez said anything about holding any position with the Union or being authorized to speak on its behalf. Garay testified that this comment "spread throughout" the facility and that this comment was why employees changed their minds about how they would vote. However, the only employee with whom he discussed this comment to was Julio Hernandez, who denied anything like that would happen. Hernandez testified that Garay had asked him if "they" would call ICE if the Union came in, and Hernandez replied "no, that it was illegal."[2] Rodriguez testified that Garay called her and asked whether it was true that, if the Union won, ICE would come in to deport undocumented workers. Rodriguez replied that this was not true, that ICE had nothing to do with the Union.

I do not credit Garay's testimony. While testifying, he was hesitant, unsure of his testimony, and appeared to contradict himself. Some of his testimony did not sound authentic but had the ring of being coached.[3] His opinion that the comment about ICE was the reason why employees changed their minds (and voted for the Union) was given without any foundation or any indication of personal knowledge. He testified that he did not attend any Employer meetings, although all other witnesses who testified about the meetings testified they were mandatory and held on the Employer's premises during the workday. Finally, Garay first denied telling any supervisor or manager about the telephone call with Rodriguez, causing one to wonder how the Employer came about to calling him as a witness.[4] However, on further prodding, he testified that he reported it to Zoe [Castillo], the maintenance manager, about fifteen days before the hearing, or about July 1, eleven days after the election. Garay did not

[1] All witnesses referred to Garay-Perez as Garay, so I will do the same. All witnesses referred to ICE (Immigration Control and Enforcement) as "Immigration." I shall use the acronym "ICE."
[2] "They" was not further defined.
[3] For example, when asked if he had spoken with Rosario Rodriguez, he gratuitously responded: "Fifteen days before the election she said..." This response did not sound genuine; rather, it sounded as though he had been coached to make sure he dated this conversation as "fifteen days" prior to the election. When asked if he told any other employees about what he had heard from Rosario, he responded: "I just made a comment, and that comment spread through the entire personnel." This definitely sounds coached. He repeated the word "spread" two more times.
[4] He even denied talking about it to the Employer's counsel who conducted his direct examination.

explain why he reported this to Zoe; after all, the Union did not lose the election, making the alleged threat by Rodriguez moot.

Paniagua testified that, approximately two weeks prior to the election, two employees, Guillermo and Minerva, whose last names she does not know, asked her about the ICE rumors. Guillermo asked if the Union would call ICE if they lost, and Minerva asked if either the Union or Employer would call ICE if they lost. Paniagua responded in both instances that she did not know.

Elvia Contreras[5] testified that, at the end of May, Ademar, last name unknown, told her that he would see that she would get terminated if she did not vote for the Union. She further testified that Union President Miranda told her in a telephone conversation two days before the election that the Employer was threatening to bring ICE in, but Contreras herself had never heard the Employer make such a threat. No evidence was offered that Ademar was an agent of the Union. The next day, Contreras told a coworker named Leo that the company was going to bring immigration in.

Sylvia Estevez, a maintenance associate at Pine Street, testified that, prior to the election, there were discussions among employees about whether undocumented workers would be terminated and replaced by new people from the Union if the Union did not win.[6] She testified that an employee named Tanisha made this statement "about 15 times." No evidence was offered that Tanisha was an agent of the Union; she was, however, one of the Employer's observers on election day.

Miguel Pineda testified that he has worked at all three of the Employer's facilities in San Francisco and had transferred to Market Street in October or November of 2014 in the position of Maintenance MOD (Manager on Duty). He transferred back to Pine Street at some time before the election, but he could not recall when or even the month. He initially testified that it was "about two months, more or less" ago, which would place the date at May 15. Subsequently, he opined that he transferred back in January. The Employer stated that he transferred back to Pine at the end of March, and he is not listed on the Market Street schedule for the week beginning March 31. Pineda testified that he overheard a conversation among Soga Eneliko, Rosario Rodriguez, and Claudia Mathews, all MODs at Market Street, when he was still employed there. One day, he heard the trio discussing union organizing and that, if necessary, they would bring the Union in through intimidation by calling ICE. When asked to explain, he testified that they said they would call ICE "to see if they could convince us that way." Mathews denied this conversation and stated that she, Rodriguez, and Eneliko did not discuss organizing until after April 21, the date she claimed some unfair treatment at work occurred.

[5] I found Contreras to be a credible witness, based upon her testimony and demeanor. She was very articulate, had a good recollection of events, was not at all evasive, and appeared to be responsive and interested in telling the truth.
[6] This makes no sense. A threat that the Employer might call ICE and terminate undocumented workers might make sense if the Union won. A threat that the Union might call ICE to report undocumented workers if it lost might make sense as a scare tactic, but it makes no sense that the Employer would replace its workers who collectively voted against the Union with new workers supplied by the Union if the Union lost the election.

Rosario Rodriguez testified that the only worker she talked to about ICE other than Garay was Julio Hernandez. He called her during the critical period and asked whether it was true that, if the Union won, ICE would come in and deport workers. She told him that was not true. Rodriguez was terminated on May 5 and was hired by the Union on June 1 to assist with the campaign. She stated she did not inform workers she was getting paid by the Union. She reported to the Union every day and helped to develop campaign strategy. She took Employer campaign literature to Miranda. She invited workers to come to a "picnic" held by the Union at its offices on May 31. Miranda introduced herself to the workers who came and explained what the Union had to offer. Rodriguez did not speak at the picnic.

Rodriguez was not a credible witness. She was evasive and avoided responding to direct questions. She falsely testified about her duties in the campaign only to be confronted with her text messages establishing the falsity of her testimony. For example, she denied exchanging any text messages with Miranda, denied contacting employees by telephone to talk about the Union, denied discussing with Miranda the messaging of a rally directed at the Employer, denied the Union ever distributed documents, and claimed she did not remember a conversation with Miranda regarding picketing or that she asked to be a Union observer. The text messages offered into evidence by the Employer established that her testimony was false. She was established to be a witness with absolutely no regard for the oath she swore to tell the truth. Consequently, I do not credit any of her material testimony that is the subject of dispute.

Miranda testified that she had heard that there were rumors among the voting group that ICE would come in (and, presumably, conduct an investigation) depending on the results of the election. She testified that she responded to anyone who asked about that by explaining their rights.[7] She testified that Quarles was hired one day before the election to participate in a phone bank and was paid for a total of two days. Rosario Rodriguez was hired by the Union to assist the organizing effort about two weeks after her May 5 discharge and about two weeks before the election. Rodriguez testified she was hired on June 1. Miranda was recalled to testify about some text messages she sent or received from Rodriguez during the critical period, May 27 to June 19. These messages essentially showed the activities Rodriguez performed to assist the organizing campaign. See Employer Exh. 2.

With respect to Objection No. 1, there was ample testimony that there were rumors about ICE and losing one's job in connection with an ICE investigation, but there is no evidence that the Union or its agents were making such threats or were responsible for the rumors. Only two witnesses testified that they received such threats: Garay testified that Rosario Rodriguez so threatened him, and Contreras testified that an employee named Ademar made a similar threat. However, for the reasons stated above, I do not credit Garay's testimony. Moreover, there is no evidence that Rodriguez was speaking on behalf of the Union or that Garay perceived her to be speaking on behalf of the Union. Similarly, no evidence was offered to establish that Ademar was an agent of the Union.

[7] The Employer did not seek any further elaboration from Miranda regarding the alleged ICE threats, so the record does not reflect what she actually told employees about these rights.

The Employer does not contend that Pineda's testimony, that he overheard Eneliko, Mathews, and Rodriguez says they would call ICE, establishes objectionable conduct since the alleged conversation occurred outside of the critical period. However, it presented this testimony to give weight to other testimony that the Union, by its agents, threatened, during the critical period, to bring in ICE if the Union lost in order to intimidate employees into voting for the Union. The overriding problem with this attempt is that there is no such other credible testimony that the Union or its agents engaged in the proscribed conduct. Moreover, the Employer is suggesting that this strategy was hatched months prior to the election by three unit employees. Pineda testified that he reported this conversation to Julio, the manager at the time. The Employer did not call this Julio to testify in support of Pineda. The Employer offered no evidence that either Eneliko, Mathews, or Rodriguez were authorized to make this statement on its behalf of the Union; this would not be possible because the Union was not contacted by the Employer's employees until much later. Nor does it seem likely that approximately two months before they contacted a union, and one month before they apparently had reason to contact a union, they would be plotting to win a union election by threatening employees with ICE. For all these reasons, I am not attaching any weight to Pineda's testimony.

Analysis

In order to properly evaluate the alleged objectionable conduct under the correct Board standard, I must first determine if Rodriguez and Ademar were acting on behalf of Petitioner when they made the alleged threats.[8] The Board applies common law agency principles to determine the existence of an agency relationship. See, e.g., *Tyson Fresh Meats, Inc.*, 343 NLRB 1335, 1336 (2004). It may, therefore, find an agency relationship between the purported agent and the principal where the agent possesses either actual or apparent authority to act on the principal's behalf: "[A]ctual authority refers to the power of an agent to act on his principal's behalf when that power is created by the principal's manifestation to him. That manifestation may be either express or implied. Apparent authority, on the other hand, results from a manifestation by a principal to a third party that another is his agent." *Id.*, quoting *Communications Workers Local 9431 (Pacific Bell)*, 304 NLRB 446 fn. 4 (1991). Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that his conduct is likely to create such a belief. *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82, 83 (1988), citing Restatement (Second), of Agency, § 27, (Comment a), 1958. Moreover, even in the absence of actual or apparent authority, a principal may be bound by the actions of an agent as if originally authorized where the principal has subsequently "ratified" those actions by its silence and/or affirmative conduct. See *Service Employees Local 87 (West Bay Maintenance)*, *supra*.

[8] The Employer offered no evidence that Ademar, Jared Quarles, Claudia Mathews, Soga Eneliko, or any other unit employee was an agent of the Union within the meaning of Section 2(13) of the Act. Rodriguez's testimony, assuming that it was competent, that Matthews and Eneliko had "equal contact" with unit employees and performed the same duties as she did is too slender a reed upon which to base a finding that they were agents. Also, the Board has held that being designated as an election observer does not make one an agent. *D.E.O. Enterprises, Inc.*, 309 NLRB 578 (1992).

To determine whether any unit employee was an agent of the Union, the guiding principles are set forth in *Cornell Forge Company,* 339 NLRB 733 (2003). There, the Board said that "prounion employees do not constitute union agents merely on the basis of their 'vocal and active union support'" and that "employee members of an in-plant organizing committee are not, simply by virtue of such membership, agents of the union....Such in-plant organizers are generally found to be agents of the union only when they serve as the primary conduits for communication between the union and other employees or are substantially involved in the election campaign in the absence of union representatives." Here, there were a handful of union supporters who manned phone banks shortly before the election, and others were involved in distributing union literature or carrying employer literature to the Union's office. The Union only held one significant organizing event – a picnic at the Union's office on May 31 – and Union President Miranda conveyed the Union's message. An individual can be a party's agent if the individual has either actual support or apparent authority to act on behalf of the party. Id. The Employer has made no showing that any unit employee had this actual or apparent authority. See also *Mastec North America, Inc.,* 356 NLRB No. 110 (2011). Thus, Ademar's alleged threat to have Contreras terminated is not attributable to the Union.

Rodriguez was discharged by the Employer on May 5. The evidence established that she was employed by the Union on June 1 and remained an employee until about June 21 and that her sole duties were to attempt to win the support of unit employees in the June 19 election. She was the principal contact between the Union and the unit employees and worked full-time at this task after she was hired by the Union. Accordingly, I find that she was the Union's agent during the time she was employed by the Union.

Recommendation

The Employer has offered no credible competent evidence that the Union or its agents threatened any unit employee that ICE would be brought in if the Union lost the election. Garay testified that Rodriguez so threatened him in a telephone call, but, for the reasons discussed above, I do not credit this testimony. Moreover, Garay asked a coworker, Julio Hernandez, if ICE would come in if the Union lost, and Hernandez replied that that would not happen and that it was illegal. Garay did not discuss this alleged threat with anyone other than Hernandez. Thus, even if Rodriguez made the statement, there is no credible evidence that it was disseminated; rather, Garay sought out a coworker about the issue and was assured nothing would happen.

Elvia Contreras testified that a coworker named Ademar threatened her in late May with termination if she did not vote for the Union, but the Employer offered no evidence that this Ademar was an agent of the Union. Contreras testified that Olga Miranda called her two days before the election to solicit her support. In this conversation, Miranda never told her that the Union was going to call immigration if it lost the election. She did say that the Employer was threatening to do that if it lost.

I find that the Employer has not sustained its burden on Objection No. 1, and I recommend that it be overruled.

Objection 2: Jared Quarles, an agent of the Union, threatened employees with a firearm and Soga Eneliko, another agent, threatened to report employee misconduct to the Employer.

Record Evidence

Eric Fernandez, Regional Maintenance Manager, testified to a conversation he had with an unnamed maintenance associate about employees Soga Eneliko and Jared Quarles. At about 5:30 p.m. on June 15, this employee told Fernandez that he[9] was receiving text messages and phone calls from a former employee, Soga Eneliko, in regards to a couple things he had done in the past at the Employer's facility. Eneliko purportedly told him that he would get him fired for these things unless he voted for the Union. The employee admitted to Fernandez that he had consumed alcohol on the job and had stolen a faucet belonging to the Employer. Fernandez did not testify that he examined the text messages on the employee's phone or even asked to see them. A couple minutes later, the unnamed employee discussed a then-current employee, Jared Quarles, with Fernandez. He said that he felt that Quarles was a crazy guy and dangerous. When asked to elaborate by Fernandez, he said "[T]he guy's not right. He's crazy. He carries a gun to work." Fernandez asked him to elaborate more, and the employee said: "Yeah, he carries [the gun] to work. He carries it sometimes in his pants. He's always waving it around. The guy is crazy." Fernandez investigated and found the gun in Quarles' knapsack. He relayed what he had learned to the police when they arrived.

Later, Fernandez returned to the employee and asked him if anyone else had seen the gun. The employee told him about, apparently, another time in the lunch room when Quarles was waving the gun around and said "I got this in case any fuckers want to get crazy." The unnamed employee told Fernandez the names of the other two employees who were present in the room when Quarles made this statement. Fernandez did not know if the Employer had contacted these other two employees; they did not testify, nor were they identified.

Regional Manager John Gannon testified that, on June 15 at about 6:00 p.m., an employee reported that Quarles had a gun in his possession at the Market Street facility. Police were called and, upon their arrival, they discovered the gun, handcuffed Quarles, determined the gun was an air soft gun, and then released Quarles.[10] Police then escorted Quarles out of the facility. Gannon testified that Quarles was led in handcuffs from the fourth floor to the third floor and bypassed a number of unit employees, perhaps, 5 to 6. There were 12-15 unit employees working at the time.

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[9] The transcript says "they," but "they" does not make sense from the substance of the conversation.

[10] In its post-hearing brief, the Employer contends that Quarles violated the Penal Code because his "imitation gun" was not predominantly colored and did not have an orange tip. However, perhaps relying upon their inherent discretion, the police chose not to arrest him. Whether or not Quarles could or should have been arrested is not relevant herein; what is relevant is that he was handcuffed, paraded, and ultimately escorted from the facility by the police.

Ana Maria Maraego, who worked at Market Street, testified that she was told by another employee about the incident where Quarles was handcuffed and accompanied by police on June 15. Naeli Mendoza, a Maintenance MOD at Market Street, testified that, just before the election, she had received a telephone call at work where the unidentified caller asked why Quarles was still working at the company. Mendoza became aware through conversations with other employees that Quarles had taken a weapon to the Employer's facility.

There are a number of reasons why this testimony is insufficient to warrant a finding of objectionable conduct. The first reason is that Fernandez's testimony is uncorroborated hearsay.[11] While the existence of the gun at work was corroborated by its discovery, the rest of the testimony was not. Moreover, even this testimony did not link the exhibition of the gun with the NLRB election. Second, no evidence was offered that either Quarles or Eneliko was an agent of the Union. This is made more problematic by the Employer's failure to call the other two eye and ear witnesses to testify. Their identity is known only to the Employer. Because of this, I must draw an adverse inference that their testimony would not support the hearsay testimony of the unnamed witness.

Analysis

The Employer has offered no competent evidence that Jared Quarles threatened unit employees with a gun if they did not vote for the Union. The Employer has offered no competent evidence that Soga Eneliko threatened to expose misconduct by an employee and get him terminated if he did not vote for the Union. Accordingly, the Employer has not sustained its burden on these alleged incidents.

The Employer did establish that word spread throughout the Market Street facility that Quarles had been detained and escorted off the premises for possessing a gun on June 15, four days before the election. The gun turned out to be an "air soft gun." Further, the record indicates that four or five Pine Street employees were aware of this incident. An issue is whether this incident combined with Quarles' service as the Union's observer at Pine Street constituted

[11] On the third day of the hearing, the Employer announced that it had subpoenaed the unnamed employee and that the witness was present in the building. However, after much ado including the clearing of the hearing room, the witness refused to appear and testify. The Employer asked that I request that the Regional Director enforce the subpoena in federal court. I referred this request to the Regional Director, but he declined to get involved, given his position as the reviewing authority under the new representation case rules. I declined to request the General Counsel to enforce the subpoena. In the first place, whereas the Board's Rules and Regulations provide that, in cases arising under Section 10 of the Act, i.e., unfair labor practice cases, the General Counsel may seek enforcement of a subpoena upon the request of a private party (Sec. 102.31(d)), there is no similar provision in the Rules and Regulations regarding cases arising under Section 9 of the Act, i.e., representation cases. See 102.66(c). Moreover, the absence of any evidence establishing that Quarles was acting as an agent of the Union at the time, indicate that the harm caused by the delay in seeking enforcement would override the benefit, if any, of seeking to compel the witness to testify. In this regard, the Employer did not even make an offer of proof that the unnamed witness had any evidence relevant to Quarles' and Eneliko's alleged status as Union agents. Finally, the unnamed employee does not link the gun to the Union's organizing campaign as he did with the alleged threat made by Eneliko. Thus, he said that he "got this in case any fuckers want to get crazy." It is just as likely if not more likely that Quarles was referring to crazies on the streets of San Francisco rather than any crazy employee who did not want to vote for the Union.

objectionable conduct. In *Embassy Suites,* 313 NLRB 302 (1993), the Board held that a union may use a discharged employee as its observer absent evidence of misconduct by that observer. This means misconduct as an observer, not as the employee, because it follows almost necessarily that the discharged employee was discharged for some alleged misconduct. The Employer cited no authority that the use of Quarles as an observer under these circumstances constituted objectionable conduct. No evidence was offered that his use as an observer intimidated any voter, nor is there any basis to infer such intimidation. And, to repeat, the Employer has not established the agency status of either Quarles or Eneliko.

Recommendation

I find that the Employer has not sustained its burden of proof on Objection No. 2, and I shall recommend that it be overruled.

Objection No. 3: The Union coerced employees during the election by having its observers use cell phones, engage in electioneering, and create the impression of surveillance.

Record Evidence

No evidence was offered with respect to this Objection except in two instances, electioneering during or just before the pre-election conference and maintaining a list of who voted at the Pine Street facility. The Employer offered no evidence that the Union had its observers use cell phones in the voting room, engaged in electioneering other than the pre-election conference, or made comments to employees as to how they should vote.

Jack Gannon, the Employer's Regional Vice-President, credibly testified that 20 to 25 Union supporters, including Jared Quarles, clad in the Union's traditional purple shirts, entered the Market Street polling location, escorted in groups of five, shortly before 11:00 a.m. for the pre-election conference. Gannon testified that, as the Union supporters entered the room, "there was a lot of yelling, cheering, and clapping going on" by them. The pre-election conference was held in the Flex Room on the second floor. In addition to the four Employer observers present in the room, there were five Union observers. The Union contingent would have passed a number of other unit employees while on their way from the fourth floor lobby to the second floor. I find that a substantial number of unit employees, certainly more than enough to affect the results of the election, witnessed this Union demonstration. Union President Olga Miranda closely approached the Employer observers and loudly and intrusively quizzed them for their names. While Miranda was interrogating the Employer's observers, Jared Quarles "was moving around rapidly, cheering, clapping, chanting," but Gannon could not recall what he was cheering or chanting about. After the conference, "there was quite a bit of yelling" as Gannon escorted the group out of the Employer's facility. Miranda called Gannon an "asshole" at this time. There is no evidence that there was any substantive content, i.e., persuasive speech urging support for the Union, during the aforesaid yelling, cheering, and clapping.

The Employer contends that Miranda communicated with an observer at the Pine Street polling location while the polls were open. While this is literally true, the observer, Soga

Eneliko, had not assumed his observer duties at the time. The polls were open at Pine Street from 12:45 p.m. to 3:00 p.m., and Miranda directed Eneliko to relieve Jared Quarles as the observer at 2:36 p.m. Emp. Exh.2 at 6. At 1:09 p.m., Miranda texted Eneliko: "Any word on Tammy or Brittany?" Eneliko responded: "Britney no answer, n Tammy the same...but I'll keep trying." It is reasonable to conclude that Miranda was asking whether Tammy or Brittany had voted yet. At 1:48 p.m., Miranda texted Eneliko to "HIGHLIGHT ONLY THE NAMES OF PEOPLE THAT VOTED" and Eneliko responded "I did." Emp. Exh. 2 at 5. Miranda admitted that Eneliko was checking the names of voters who had voted on a list of voters she had given him the day before. Miranda allowed the possibility that Eneliko was in and around the location of Pine Street. Based upon the totality of the evidence, I find that Eneliko was monitoring the identities of unit employees at Pine Street who had voted and was necessarily in a place where he could do that. There were 17 unit employees at Pine Street.

Analysis

The Employer argues that the Union's conduct at the pre-election conference violated the Board's *Peerless Plywood* rule against holding captive audience speeches within the 24-hour period before the election. 107 NLRB 427 (1953).[12] The Board has applied this rule to the use of sound trucks to broadcast union songs. *Bro-Tech Corp.,* 330 NLRB 37 (1999). In this case, a union sound truck broadcast tape-recorded music, including pro-Teamsters songs, for 9 1/2 hours during the day of the election, including during the polling period. The sound was clearly audible at a number of employee work stations throughout the facility and "more importantly, [employees] heard its message encouraging their support for the Union." Applying *Peerless Plywood* and *U.S. Gypsum Co.,* 115 NLRB 734 (1956), the Board held that this conduct ran afoul of the 24-hour captive audience rule and ordered a new election. The Board stated:

> "As the above description of the *Peerless Plywood* doctrine demonstrates, the Board's goal is to keep voters as free of uninvited mass messages as possible during the period just prior to the conduct of the election....This was not an effort by a party to engage in voluntary discussions with employees about the merits of union representation. Instead, just prior to casting their votes, these employees... were exposed to the Union's campaign broadcast whether they wished to hear it or not. As the Board reasoned in *U.S. Gypsum*, employees thus unwillingly exposed to a campaign message became a captive audience within the meaning of *Peerless Plywood.*
>
> In addition, employee testimony establishes that those who heard the broadcast clearly understood the persuasive character of the message being sent, i.e., that the Teamsters Union was the correct choice in the election. Thus, contrary to the reasoning in the Board's original representation case decision (and in deference to the court's remand), we find that the partisan content of the songs is sufficient to place it within the realm of campaign speech under *Peerless Plywood.* Whether in

[12] Objection No. 3 alleges the Union coerced voting unit employees by, among other things, engaging in electioneering. Accordingly, I find that the Union's conduct at the pre-election conference is an issue within the scope of this Objection.

> the form of lyrics to a pro-Teamsters song, a nonmusical partisan oration, or a dry recitation encouraging support for a particular electoral choice, we find that they all fall within the broad rubric of campaign speech within the proscription of *Peerless Plywood.*"

This presents an interesting issue of legal interpretation. Is objectionable conduct made out by the captive audience situation alone, as discussed in the first paragraph above, or does a finding of objectionable conduct also require the substantive campaign content discussed in the second paragraph? I conclude that a *Peerless Plywood* violation requires both a captive audience and substantive partisan campaign message.

The Union demonstration or rally herein lasted for a few minutes, perhaps, up to ten minutes. Although the sound truck cases involved broadcasts that lasted hours, I do not see any indication in the case law as to how long proscribed conduct has to continue to come within *Peerless Plywood.* Accordingly, I find that the chanting, clapping, and cheering by the Union demonstrators herein made the Market Street employees a captive audience within the 24-hour proscribed period. But, as stated above, that does not end the inquiry. The question is whether this behavior amounts to substantive campaign speech. Because there was no substantive conduct in the Union's demonstration, I find that the facts presented herein do not amount to a violation of the *Peerless Plywood* rule, and I shall recommend that Objection No. 3 be overruled with respect to this issue.[13]

The Employer contends that Eneliko's list-keeping created the impression of surveillance among unit employees. It has long been Board policy that the keeping of a list of those who have voted, other than the official eligibility list, may be grounds for sustaining an objection. *Piggly-Wiggly,* 168 NLRB 792 (1967). In *Mead Coated Board, Inc.,* 337 NLRB 497 (2002), the Board stated that the proper analysis of this objection is set forth in *Sound Refining, Inc.,* 267 NLRB 1301 (1983). In that case, a union observer kept his own list inside a folder or notebook and, as employees appeared to vote, opened the folder or notebook and made a notation next to the names of the voters. The Regional Director found that the petitioner in this decertification proceeding was unable to present any evidence that any voter was aware that his name was being checked off and concluded that any breach of the Board's election rules was *de minimis*, not constituting grounds for setting aside the election. The Board disagreed, finding that the petitioner's failure to present any direct evidence that any employee other than petitioner had witnessed the list keeping did not detract from its finding that the objection was meritorious. The Board noted that an exception to the general rule had developed to cover those instances in which none of the voters or only a small number knew that the prohibited list was being kept. The Board stated: "...in all the circumstances, it can be inferred that the voters knew that Barber was recording their names. In this regard, we note Barber's conspicuous presence at the polls as an election observer and the absence of any indication of an attempt by Barber to conceal his conduct."

[13] Olga Miranda's conduct at the pre-election hearing does not amount to objectionable conduct. This conduct was more likely to induce employees to vote against the Union than to intimidate them to vote for it.

Unlike the list-keeping observer in *Sound Refining, supra,* Eneliko was not acting as the election observer at the time he was allegedly keeping the list. He had no conspicuous presence at the polls. There is no evidence that voters would have crossed his path. Unlike the election observer sitting at the check-in table whose job is to acknowledge each voter, there is no evidence that any voter herein was aware of Eneliko's presence.[14] I, therefore, find that there is no evidence to warrant the finding that Pine Street voters knew that Eneliko was lurking nearby and recording their names.[15] Accordingly, I shall recommend that Objection No. 3 be overruled.

Objection No. 4: Board Agents conducting the election allowed Union misconduct to occur.

In its post-hearing brief, the Employer requested to withdraw Objection No. 4. I recommend that the Employer's withdrawal request be approved.

Objection No. 5: The Union, by its agents, destroyed the atmosphere necessary to conduct a fair election; such atmosphere was also destroyed by conduct of Union supporters even if not agents.

Record Evidence

In his Order, the Regional Director concluded that Objection No. 5, a general catchall allegation, encompassed an allegation of objectionable conduct based on the Board's third-party standards regarding the rumors about ICE. The evidence with respect to this issue is the same as the evidence discussed under Objection No. 1.

The following is a summary of the competent and not discredited hearing testimony regarding ICE rumors. Olga Miranda told Elvia Contreras that the Employer was threatening to bring ICE in. Contreras responded that she had not heard anything about the Employer bringing in ICE. Contreras testified that Ademar threatened that he would see she would get terminated if she did not vote for the Union. She also testified that she told Leo that the company was going to bring in ICE. Esther Paniagua testified that Guillermo asked her would ICE be called in if the Union won. Minerva asked her if ICE would be called in either way, whether the Union won or lost. Paniagua responded to both employees that she did not know. She also testified that this topic arose with Guillermo and Minerva but no one else. Ana Maraego testified Contreras told her three persons had told her they were going to kick her out if she did not vote for the Union. No evidence was offered as to who these three persons were and whether they possessed the

[14] The reason why there is no such testimony may be that the Employer did not discover this conduct until after the second of three days of hearing. The subpoena duces tecum had requested that these communications be produced at the commencement of the hearing, but the Union did not produce them until after the second day. Perhaps, the equitable course of action would be to re-open the hearing and allow the Employer to subpoena Eneliko and/or produce other witnesses who could testify to what Eneliko was doing during the first two hours of the polling at Pine Street. However, I do not have that authority.

[15] The Board has held, and the Employer so argues, that the reason for the Board's prohibition of list keeping is that it creates the impression of surveillance among employees who know or can reasonably expect that a party is recording their names . On this basis, I find that Eneliko's list keeping comes within the substance of Objection No. 3, even though it was not specifically alleged as objectionable conduct.

authority to discharge. Since Contreras testified that only one person, Ademar, threatened her with job loss, I note that her testimony is inconsistent with the above hearsay testimony of Maraego.

Naeli Mendoza testified that one person at Pine Street asked her if it were true that the Union would ask who was undocumented after they won and she overheard three others asking the same thing.[16] Finally, Sylvia Estevez testified that Tanisha told people at Pine Street approximately fifteen times, on a daily basis approaching the election, that current employees who did not vote for the Union would be replaced by new people from the Union if the Union won the election. Estevez did not specify how many employees heard these comments. In its post-hearing brief, the Union contends, with some persuasiveness, that this seems like an attempt to convince people not to vote for the Union and that this interpretation is consistent with the Employer's selection of Tanisha as one of its election observers. The Employer did not call Tanisha to testify, and there is no evidence that she is no longer employed by the Employer. Instead, it called Estevez to testify that Tanisha made these statements. Under these circumstances, i.e., the substance of what Estevez heard Tanisha say, her selection by the Employer as one of its observers, and the failure of the Employer to call Tanisha as a witness provides strong justification for interpreting Tanisha's remarks as the Union contends.

Outside of the employees to whom Tanisha made her remarks, the following eleven unit employees were involved in conversations regarding ICE: Contreras, Ademar, Leo, Paniagua, Guillermo, Minerva, Maraego, Mendoza, one unnamed person at Pine Street, Estevez, and Tanisha. Some heard or asked questions, and others heard or made statements. Some of the conversations involved what the Union would do if it lost, what the Union would do if it won, or what the Employer would do if it lost. The record does not establish whether Tanisha spoke to employees other than those named above.

Some of the statements make no sense. The Official Notice of the Board states that the election will be conducted by secret ballot; there is no explanation how Ademar, for example, would know which way Contreras voted. Loss of one's job is a serious threat, but it is quite unlikely that Ademar, as a unit employee, would be able to carry it out especially if the Union lost. Since employers, not unions, have the authority to discharge, there is no explanation why any employee would find credible a threat that the Union would cause employees to be terminated. There was no explanation why the Union would take any retaliatory action if it won. Nevertheless, it seems that ICE and its relationship to the election was a topic of general discussion at the Employer's facilities during the critical period.

In addition to the third-party conduct issue, I will address an issue that arose at the hearing, i.e., the Union's designation of Rosario Rodriguez as its observer at the Union Street facility for the election. Rosario Rodriguez was the Union's observer at Union Street. No evidence was offered that anyone at Union Street knew she was an employee of the Union at the time. Indeed, the hearing was devoid of any discussion of the Union Street facility other than the

[16] Note, here, that the concern is whether ICE would be brought in if the Union won rather than lost.

number of employees at that location and who the observers were. No objectionable conduct was alleged to have occurred at the Union Street facility.

Analysis

When there is no evidence that a party is involved in alleged misconduct the test to be applied is "whether the misconduct is so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984); see also *Lamar Advertising of Janesville*, 340 NLRB 979, 980 (2003); *Cal-West Periodicals*, 330 NLRB 599, 600 (2000). Further, "[c]ourts are hesitant to overturn elections when statements cannot be attributed to the Union because 'there generally is less likelihood that they affected the outcome.'" *NLRB v. Eskimo Radiator Mfg. Co.,* 688 F.2d 1315, 1319 (9th Cir. 1982), quoting *NLRB v. Mike Yurosek & Sons,* 597 F.2d 661, 663 (9th Cir. 1979). Thus, "inasmuch as a union (or an employer) cannot control nonagents, there are equities that militate against taking away an election victory because of conduct by a nonagent." *Cal-West Periodicals,* 330 NLRB 599, 600 (2000). With regard to threats by non-agents, in determining the seriousness of threats, the Board considers the following factors: (1) the nature of the threat itself; (2) whether it encompassed the entire unit; (3) the extent of dissemination; (4) whether the person making the threat was capable of carrying it out, and whether it is likely that employees acted in fear of that capability; and (5) whether the threat was made or revived at or near the time of the election. *Westwood, supra*, at 803.

I am not persuaded that the Employer has met its burden under *Westwood* of establishing that the third-party conduct was "so aggravated as to create a general atmosphere of fear and reprisal rending a free election impossible." While the loss of one's job is a serious threat, there is no reason to believe that those who heard such threats understood the speaker to be capable of carrying it out, and, as mentioned above, the alleged threats are contrary to logic and common sense. There is no evidence the threats encompassed the entire unit; instead, most of the threats were isolated. Some of the alleged threats were actually questions, and some of the threats concerned potential action to be taken by the Employer not the Petitioner.

Board precedent does not support setting aside elections based solely on third party deportation threats. In *Mike Yurosek & Sons,* 225 NLRB 148, 150 (1976), enfd. 597 F.2d 661 (9th Cir. 1979), the Board held that a threat by fellow employees to call immigration authorities during an election campaign does not, by itself, exacerbate employees' fear of deportation so as to render them incapable of exercising a free choice in the election. Moreover, the present case is distinguishable from cases where the Board has set aside elections based in part on third-party deportation threats. In *Crown Coach Corp.,* 284 NLRB 1010 (1987), unlike in the present case, the deportation threats, which were widely disseminated, occurred repeatedly throughout the campaign and were rejuvenated near the time of the election. In addition, there were threats of physical harm that contributed to the atmosphere of fear. In *QB Rebuilders, Inc.,* 312 NLRB 1141 (1993), the INS detained an employee at the employer's facility in the presence of 20 employees. This occurred on the day before the election and followed widely-disseminated threats to call the INS. In *Robert Orr-Sysco Food Services,* 338 NLRB 614 (2002), the deportation threats were accompanied by threats of physical damage and property damage.

Accordingly, I shall recommend that the Employer's Objections, as they pertain to third party threats to bring in ICE, be overruled.

With respect to the Union's use of Rodriguez as an observer, the Board has held that it is objectionable conduct where an incumbent union in a decertification election uses a nonemployee agent as its election observer. *Butera Finer Foods*, 334 NLRB 43 (2001). The Board pointed out that it has established noncontrolling written guidelines concerning the use of union officials as election observers. Those guidelines state that a nonemployee union official should not serve as an observer unless he/she is also an employee of the employer. See Casehandling Manual, Volume 2, Section 11310.2.[17] As for certification elections, the Board has held that a union may use a discharged employee as its observer, absent evidence of misconduct by the observer. *Embassy Suites,* 313 NLRB 302 (1993); see also *First Student, Inc.,* 355 NLRB 410 (2010); *Browning-Ferris Industries of California,* 327 NLRB 704 (1999).

I shall recommend that Objection No. 5, insofar as it includes the issue of Rodriguez as an observer, be overruled for the following reasons: (1) The Employer did not specifically raise this issue in its Objections, thereby depriving the Union of any notice that this would be an issue; (2) Rodriguez, while technically "on the Union's payroll" at least temporarily, was hardly a "union official" as that term is commonly understood but served as an organizer at the Employer's facilities for a period of nineteen days subject to the direction of Olga Miranda; (3) no evidence was introduced that any unit employee, especially the employees employed at Union Street, had any knowledge that Rodriguez was a temporary employee of the Union; (4) no evidence was offered that Rodriguez used her capacity as a temporary Union employee to threaten or coerce Union Street employees in any way or otherwise acted in an improper fashion while serving as the Union's observer.

CONCLUSION

I recommend that the Employer's objections be overruled in their entirety. The Employer has failed to establish that its objections to the election held on June 19, 2015 reasonably tended to interfere with employee free choice. Therefore, I recommend that an appropriate certification issue.

APPEAL PROCEDURE

Pursuant to Section 102.69(c)(1)(iii) of the Board's Rules and Regulations, any party may file exceptions to this Report, with a supporting brief if desired, with the Regional Director of Region 20 by October 2, 2015 A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the Regional Director.

[17] Based on the record, Rodriguez was not an employee of the Employer as of June 19, as she had been discharged on May 5. No evidence was offered that Rodriguez was alleged to be a discriminatee in any pending unfair labor practice charges, which may have given her employee status at the time of the election.

Exceptions may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the exceptions should be addressed to the Regional Director, National Labor Relations Board, [Regional address].

Pursuant to Sections 102.111 – 102.114 of the Board's Rules, exceptions and any supporting brief must be received by the Regional Director by 5:00 p.m. (PDT) on the due date. If E-Filed, it will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later than 11:59 p.m. Eastern Time on the due date.

Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further time as the Regional Director may allow, a party opposing the exceptions may file an answering brief with the Regional Director. An original and one copy shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Dated: September 18, 2015

/s/ David B. Reeves

David B. Reeves
Hearing Officer

CERTIFICATE OF SERVICE
AND OF
FILING WITH THE REGIONAL DIRECTOR

Case Name: Equinox
Case No.: 20-RC-153017

I, Cheryl Cleary, declare that I am employed with the law firm of Jackson Lewis P.C., whose address is 50 California Street – 9th Floor, San Francisco, CA 94111; I am over the age of eighteen (18) years and am not a party to this action.

1) On November 24, 2015, I served the attached **EMPLOYER'S REQUEST FOR REVIEW** on the other parties in this action as follows:

Olga Miranda, President Service Employees International Union, Local 87 240 Golden Gate Avenue San Francisco, CA 94102 Phone: (415) 885-0087, x39 Fax: (415) 931-8830 olgam@seiulocal87.org	Hunter Pyle Sundeen Salinas & Pyle 428 13th Street - 8th Floor Oakland, CA 94612 Phone: (510) 663-9240 Fax: (510) 663-9241 hpyle@ssrplaw.com vandrade@ssrplaw.com
Petitioner	*Petitioner Legal Representative*

[✓] BY ELECTRONIC MAIL (EMAIL): I attached a full, virus-free pdf version of the document to electronic correspondence (e-mail) and transmitted the document from my own e-mail address, clearyc@jacksonlewis.com, to the persons at the e-mail addresses above. There was no report of any error or delay in the transmission of the e-mail.

2) On November 24, 2015, I filed the attached **EMPLOYER'S REQUEST FOR REVIEW** on the Regional Director in this action as follows:

[✓] BY ELECTRONIC FILING (E-FILING): I went to www.nlrb.gov, selected E-File Documents, entered the NLRB Case Number, and followed the detailed instructions for filing the document with the Region.

I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on November 24, 2015, at San Francisco, California.

Cheryl Cleary